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UNIVERSITY OF MISSISSIPPI LAW SCHOOL
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LEADING ARTICLES

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To the Members of the Mississippi State Bar

The next meeting of the State Bar will be September 3-4, at Greenville, Miss., and I trust that each lawyer will consider this a personal request from the officers of the Association to attend the Greenville meeting. There will be matters of both interest and importance to the legal fraternity discussed at that meeting and every member of the bar is invited to take part in these discussions.

The Mississippi State Bar is doing some good work and if the entire bar will co-operate, both the public, business and industry, as well as the legal profession will profit thereby.

The Delta will go the limit to make this meeting a success and will see to it that the individual lawyers and their families enjoy their visit to the "Garden spot of the World!"

Please let me insist that you drop your business cares for these two days and attend this meeting.

Sincerely,

FRANK E. EVERETT,
President Mississippi State Bar.

MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR

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SCOPE OF EMPLOYMENT— THE RESTATEMENT— LOPER V. Y. & M. V. RY. CO.

W. W. VENABLE*

It is certain that the American Law Institute's Restatement of the Law will have much influence. Appellate courts, correctly appraising it as the expression of the most learned and best considered legal opinion in the nation, will be inclined to consult and to follow it, unless prevented by statute or well-established policy.

This will involve an interpretation and construction of its provisions, a comparison with the rule declared in local precedents, and where there is difference, there will arise the necessity of deciding whether to follow or not. This will involve, if the work be well done, a thorough re-examination of precedents and a broad and comprehensive study of the question involved in relation to the social economic, cultural, industrial, and other conditions of life, of the people, to the end that the rule be chosen which best promotes their interests.

Aside from other considerations, such a work is of supreme practical importance, not alone to appellate courts and the people whose interests will be affected, but also to the practicing lawyer. Upon him is the primary duty of raising questions and presenting the reasons for decision pro and con.

If change be made, unless its implications are comprehended, and its effect upon precedents are noted, they will become misleading to the Bar, and many times to the Court. If change be made, it should be a conscious one, with reasons clearly stated and fully appreciated.

It is a lively comprehension and appreciation of such considerations that has caused the State Bar, under the able direction of Chief

*Former President of The Mississippi State Bar Association; member of the Clarksdale, Mississippi, Bar.

Justice Smith, to undertake the annotation of the several Restatements as they have been published. Ready access by Bench and Bar to the Restatements so accompanied by applicable decisions, will prove of great assistance.

Possibly the most forceful way to present the importance to the lawyer of comparing our previous decisions with the applicable Restatement, may be to show the Restatement in action. *Loper v. Y. & M. V. R. R. Co.*¹ may be taken as illustrative. It deals with the question, frequently arising, whether or not a given act of a servant is within the scope of his employment.

Before the consideration of this case, and a few others, in order to provide a setting for the discussion, it may be well to recall a few fundamentals in this field.

In a broad sense, rights and obligations grow out of relations, either of persons to persons or persons to things. One way, at least, to look at a given situation for the purposes of analysis, is to examine the relations inherent in it.

A master employs a servant in a business to perform certain duties. The contract of hiring limits the field of the servant's activity from engaging in all parts of the master's business to a given and designated field of activity. He, by choosing a human instrumentality to accomplish his purposes, has chosen one apt to have the not unusual weakness of human nature, temper, lack of judgment, etc. He has chosen the servant to accomplish certain purposes, one of these being the immediate acts which the servant is hired to perform, expected to result in accomplishing the particular work that the master has allotted to the servant. Another is the remoter objects sought to be accomplished in the general business towards which the acts and expected accomplishments of the servant are but steps.

For illustration, a fireman, primarily hired to fire the engine, has a single additional duty of reporting trespassers to the conductor, being prohibited from putting the trespasser off himself. As to the matter of trespassers, the immediate object of the hiring is to cause the conductor to be informed of their presence. With putting them off, the fireman has nothing to do by express command, yet the remoter object is removing trespassers from the train, any information given by a fireman being a step towards its accomplishment. Again, a servant is employed to pack ice cream by an ice cream manufacturer. The immediate object of the hiring is to get the ice

¹166 Miss. 79, 145 So. 743 (1933).

cream packed. A remoter object is that it may be shipped to a customer.

There is also a subjective element in the situation. The motive of the servant in doing a given act, may be to serve his own purposes entirely, to serve the master, or to do both. In dealing with others he may give way to his human weaknesses and do some act that he was not hired to perform, and which in fact was against his master's will or express orders, but which, nevertheless, arose immediately out of and was caused by the performance or an attempt to perform some authorized act. It might be an act relating to a function not given to that servant, but to some fellow servant.

It is obvious that any given act may be considered with respect to its relation to the general objectives of the master, with respect to the special objects of the particular employment, with respect to others with whom the servant is brought in contact by virtue of his hiring, with respect to the relation between the object of the particular employment and its relation in turn with remoter objects with which the particular employment is related, etc. Is the act in question authorized or similar in kind to that authorized; is it to be considered as reasonably incidental to the particular employment as being something that is to be expected from a servant in the given situation, and hence reasonably incidental to the employment in the sense of being something that might reasonably be expected to happen in connection with it?

The law might have made the master liable simply because of the hiring, regardless of the connection of the act with any business of the master. It is clear that it does not adopt such a standard. It makes the master liable for his employee's acts as servant and not simply as a human being. It might have imposed liability for the reason that the act was done by a servant and with a motive of benefiting the master in the business in which the servant was employed without any necessity for connection between the act and the specific functions the servant is hired to perform. It did not adopt this standard. Though for the master's benefit, there is no liability, if the act is not within the scope of the employment.²

Behind such announcements is the recognition of the rule that, in the conduct of his business, a master may divide the work and delegate to different servants the several different tasks, being liable only when the act of a servant falls within the circumference of the circle of his particular functions.

²Davis v. Price, 133 Miss. 236, 97 So. 557 (1923).

Since in nearly every case wherein liability is imposed, the act complained of is one that is either unauthorized or specifically prohibited and in nearly every case against the wish and will of the master, it is clear that the circumference of the circle of liability, while it must be connected with the specific employment or hiring, is larger than the acts falling within the circle of the actual terms of the hiring.

In many cases of liability it cannot be said, with any regard to reality, that the master hired the tortious act done. Since the act must bear relation to the actual employment and does not fall within the terms of the hiring, the basis of liability would appear to lie in the functional relationship between the given wrongful act and the acts he was hired to perform, or the objects thus sought to be attained. It might be well said that since the master by his hiring placed the servant actively about his duties and chose this human instrumentality with its weaknesses of temper, judgment, and disposition, he should be held liable for his acts, provided that he was functioning in immediate connection with his duties under the terms of his employment, and the functioning could fairly be said to arise out of them.

There must be a rational and just connection between the act done and the acts authorized, or between the act done and the object or objects sought to be attained by the acts authorized, or else we are making the master liable for the act of the servant as a human being and not as servant, or we are denying the master the right to divide his work between different servants.

Mr. Labatt states the question as follows:³

"The fundamental question to be determined in every case which involves the vicarious or constructive liability of the master for the torts of a servant are these:

1.

"Was the function which the servant was discharging at the time when the tort was committed, a function within the range of the contract of hiring, or which had been allotted to him after he commenced the performance of the contract?

2.

"Was the act done solely with the view of attaining some personal end?"

³LABATT, MASTER AND SERVANT (2d ed. 1913) 6851, § 2274.

The Restatement of Agency makes the statement⁴ that conduct of a servant is within the scope of employment if, but only if, it is of the kind that he is employed to perform; if the act occurred within authorized time and space limits and is actuated, at least in part, by a purpose to serve the master.

It is apparent that questions may arise as to the test for similarity in kind, as between the acts authorized and the acts done. A very material one would seem to be whether a given act, though different from any act authorized, can be considered as similar because of the object sought to be accomplished thereby in relation either to the objects of his specific employment or some more remote object in the general business in which the servant is functioning.

The Restatement of Agency declares⁵ that to be within the scope of employment the conduct must be of the same general nature as that authorized, or incidental to it. Here it appears that the phrase "same general nature" means the same thing as "of the kind he is employed to perform," as used in the preceding section.

Here also the question arises as to when one act is incidental to another within the meaning of the statement.

This section states the matters to be considered in determining similarity and incidental quality, namely: whether or not the act is one commonly done by such servants; the time, place, and purpose of the act; the previous relations between the master and the servant; the extent to which the business of the master is apportioned between different servants; whether the act is outside the enterprise of the master, or if within the enterprise, has not been entrusted to any servant; whether or not the master has reason to expect that such act will be done; the similarity in quality of the act done to the act authorized; whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; the extent of the departure from the normal method of accomplishing the authorized result; and whether or not the act is seriously criminal.

In a comment, the Restatement makes the statement that an act may be incidental to an authorized act though, considered separately, it is an entirely different kind of an act. "To be incidental, however, it must be one which is subordinate to or pertinent to an act the servant is employed to perform. It must be within the ultimate objective of the principal and an act which it is not unlikely that a

⁴RESTATEMENT, AGENCY (1933) § 228.

⁵*Id.*, § 229.

servant might do." As thus interpreted, the act to be incidental must have the quality of pertaining to authorized conduct, must be within the ultimate objective of the master, and must be an act that it is not unlikely that the servant might do.

Questions arise here as to what is meant by the ultimate object of the master. How close must the act be to the object of the particular employment? Questions may arise as to what is meant by "an act that it is not unlikely that a servant might do." Does this mean in the particular situation with the particular servant and the particular master, or does it mean abstractly without consideration of the particular situation? According to the comment it seems to mean the last.

A consideration of Section 229 reveals that the elements that are to be considered fall within certain broad groups, the first as to what the master might reasonably expect the servant to do. Whether or not the act is one commonly done by such a servant, the previous relations of the master and servant with respect to the work formerly done, whether or not the subject matter of the act has been assigned to some other servant, any reason for the master to expect the act to be done by the servant, the extent of departure from the normal method of accomplishing an authorized result, and an extreme criminality of an act, may all to be looked to from the viewpoint of what the master might expect could happen, and hence rest the liability thus imposed, if such is the case, on the notion of justice that the master having chosen the servant as his instrumentality should be held liable for what a reasonable man might expect as not unlikely to happen.

However, such a test might include acts, which, though they might be within possible expectation, are not sufficiently related to any work of the master, so the act must be pertinent to the work the servant is employed to perform. The master is not liable, it is said, unless it falls within some objective of the master, and at the same time the kind of an act that such a servant is not unlikely to do.

It is apparent that in a given case where several considerations enter into the problem the result reached may depend on the weight given to any given element or combination in respect to others. It may be that, though normal requirements for liability are met, the act was done at such time and place, or from such purely personal motives that it cannot be said that the servant was acting as such.

The opinions written in our precedents do not give us the benefit of a statement of the various elements which were considered by

the judges in reaching their conclusions, except in a few instances. Like nearly all courts they have been content to state conclusions with citations, without much philosophical or analytical discussion.

The Restatement will inevitably bring the various elements to be considered into the active consciousness of both Bench and Bar in the preparation, argument, and decision of cases and, in the opinion of the writer, will produce some changes in our decisions.

That the Restatement can and will have such effect, I will endeavor to show.

In the case of *Illinois Central R. R. Co. v. Latham*,⁶ a trespasser was forcibly ejected from a moving train by a brakeman and injured. Under the terms of hiring and rules, the duty of the brakeman was to report plaintiff's presence to the conductor and act under his instructions. The proof showed that the brakeman was not trying to collect fare, but money that he intended to appropriate, and for failure to pay which he threw plaintiff from the train. The Supreme Court ruled that the act was beyond the scope of the servant's employment and that a peremptory instruction should have been given for defendant.

In *Southern Railway v. Hunter*,⁷ a flagman whose duty was to carry trespassers to the conductor and, if he authorized it, to have the train stopped and eject them, violently threw a trespasser from the moving train. He lay upon the track for sometime unconscious and was run over by a following train and seriously injured. The lower court sent the case to the jury and instructed them that if they believed that he was violently thrown from the moving train by the flagman, they should find for the plaintiff. The giving of this instruction and refusal to grant a peremptory instruction for defendant was the basis of appeal and questions for review. The Supreme Court approved the instruction given plaintiff and the action of the lower court in refusing a directed verdict and held that the act was within the scope of employment of the servant because "he did have a duty to perform for the master in regard to trespassers" to-wit: "to carry them to the conductor and if the conductor told him to do so, to pull the engine down, etc., and put them off."

In *Illinois Central R. R. Co. v. Green*,⁸ a fireman, as found by the jury, left his engine, went back on the train, and assaulted a trespasser with a pistol. The proof showed, or it was assumed as

⁶72 Miss. 32, 16 So. 757 (1894).

⁷74 Miss. 444, 21 So. 304 (1897).

⁸130 Miss. 622, 94 So. 793 (1923).

a fact by the court, that the fireman had no duty, by the terms of his employment, or the rules of the company, to deal with trespassers and reversed the case on two grounds, first, that the act was beyond the scope of the servant's employment, because his only duties were to coal the engine and such other incidental duties as were necessary to operate the engine, and second, that the shooting was done from some motive wholly personal. On reversing the case, the court entered judgment for defendant.

In the case of *Loper v. Y. & M. V. Ry. Co.*,⁹ a trespasser was injured by being forcibly ejected from a moving train by the fireman. Proof was made in the trial court that, under the rules of the company, the fireman had the duty to report the presence of the trespasser to the conductor, and this only. (An assumption made by the Supreme Court for purposes of considering the case.) A peremptory instruction was given for the defendant. On appeal, it was held that whether or not the servant was acting within the scope of his employment, was a question for the jury at least, and on reversing the case, the court left the question open whether or not the plaintiff should be given a peremptory instruction on a new trial. In Hunter's case, *supra*, the master was held liable because the servant had some duty to perform in respect to trespassers, though not the duty of putting them off, and the court, if it had followed this case, would have reversed the case with instructions to this effect, if on a new trial the evidence continued to show these facts. The present value of Hunter's case, in view of the course taken by the court in *Loper's* case in reserving a ruling on this phase in giving rulings for new trial, is somewhat doubtful.

In all of the cases thus far mentioned, the facts are identical in several particulars. In each case a trespasser on a train was wilfully kicked, shot, or thrown off while it was in motion by some employee of the master engaged in the operation of the train for the master. In each case the trespasser was injured by like conduct.

In none of the cases did any servant have the duty by the terms of his employment to put trespassers off of trains. The implications of the rules of the company that they were to report to the conductor, where they were hired to deal at all with trespassers, implies a prohibition that they were to do nothing else with respect to them.

In Green's case, non-liability as to one ground was predicated upon the fact that the fireman, under the terms of hiring, had no

⁹166 Miss. 79, 145 So. 743 (1933).

duty whatever with respect to trespassers. In Hunter's case, liability was predicated because the servant had *some* duty to perform relative to trespassers, though his act was not pursuant to the performance of the specific duty he was in terms hired to perform.

In Latham's case, the facts were the same, with the additional fact added that the servant was acting solely for his private purposes.

Hunter's case proceeds, it seems, upon the theory that the servant having been employed to do a certain act looking toward a given result desired by the master, any act, even one prohibited, done towards this end, fell within the scope of the employment. It is to be noted that the act actually done by the servant was one totally different in kind and quality from the act authorized.

None of these phases were discussed by the court, but seem to be implicit in the case. Here the ground of decision seems to have been the relation of the act done, with respect to the object of the master regarding which the servant had been employed to perform some duty. The fact that it was different in kind or quality in respect to the act authorized seems not to have been within the conscious thinking of the court, or if it was, offered no difficulty. Whether such a departure from authorized conduct should have been expected by the kind of master with the kind of servant involved, also received no discussion. Neither did the court think that there was any question for the jury relative to the elements mentioned.

In Loper's case, where the facts were similar, in reversing the case and the action of the lower court in giving a peremptory instruction for the defendant, the court, evidently influenced by the Restatement, which is cited, did not hold that, on the facts disclosed, the servant was acting within the scope of his employment, but reserved this question. Invoking the Restatement, it undertook to reason out to the result reached by considering and weighing the elements therein directed to be considered. Taking the rule as announced, that unauthorized conduct to be within the scope of employment must be similar to the authorized conduct or incidental to it, it conceded that the conduct complained of was not similar, but might be held to be incidental, and announced that it was a question for the jury, at least, and hence a peremptory instruction should not have been given.

Following the Restatement, the result was reached by its rule that conduct though dissimilar to authorized conduct, might be incidental to it, provided it fell within the ultimate purpose of the

master, was pertinent to the authorized conduct and was something it was not unlikely that the servant might do. The Restatement says that unauthorized conduct is incidental, provided it is subordinate to or pertinent to the authorized conduct. The court held that the ultimate objective of the master was to keep trespassers from the train and that the ultimate objective of the master was their ejection and ruled that kicking the trespasser from the train was pertinent to the authorized conduct of reporting his presence to the conductor.

In the common acceptance of the term, it is difficult to see how kicking a trespasser from a moving train and injuring him is subordinate to or pertinent to reporting his presence to the conductor. Unless we say that refusing to perform the authorized act at all, and the doing of something else makes pertinency, it is difficult to think of the one as pertinent to the other. Kicking the trespasser from the train is no process towards performing the authorized conduct of informing the conductor. It defeats the immediate object of the master to place the ejection of trespassers in the hands of the one in charge of the train, the conductor.

The Restatement, however, adds another element—that the conduct must be within the ultimate objective of the master. If it is meant that the unauthorized conduct is pertinent to the authorized conduct, if and when the unauthorized act falls within the area of some objective of the master, within which area the terms of employment authorize some duty or functioning by the servant, the test becomes less difficult and easier to apply. But, in addition to this, the dissimilar act must be one that a master would expect as not unlikely to happen. Relative to this element, it is stated that it is not a question of what a certain master might expect of a certain servant, but what a master of the kind would expect of a servant of the kind. This element would seem to call into play a wide field for the services of the jury, as does the standard of the "reasonable man" in the field of negligence, and for the same reasons.

In Hunter's case, the court in effect approved an instruction that a servant whose duty it was to report trespassers, was acting within the scope of his employment in forcibly ejecting them, though it might have been argued that it was for the jury to say whether or not the master should have expected such conduct as not unlikely to happen. It is highly probable that this element in the case was not in the mind of the court when considering the case, yet, if it were,

the case is a holding that no reasonable men could differ about the matter.

In *Loper's* case, the court would not base its decision on this question, as it could have done, but in effect reserved the point, as we think, for future consideration. It cannot be assumed that the court overlooked this phase of *Hunter's* case. Whether the juries will be used in some situations upon which our courts have ruled heretofore as being a matter of law remains to be seen. It is highly probable.

The element that the unauthorized act must fall within the ultimate object of the master, brought to the fore in our thinking, may produce some changes in our cases. In any business of wide scope, the master has many objects that may be considered ultimate or immediate, depending on the viewpoint and what objects we are considering. One object of the master in giving a duty to a fireman to report trespassers to the conductor, is to get information to the conductor as to their presence; this in turn is to have the conductor deal with them as he shall see fit—it may be to stop the train and put them off immediately, or it may be to put them off only at the next regular stop, etc. Other objects may be to protect goods or passengers or something else. It must be pertinent to the conduct authorized, but the conduct authorized is related to many objects of the master towards the accomplishment of which the authorized conduct is a means.

In *Davis v. Price*,¹⁰ a manufacturer of ice cream, for purposes of shipment and sale, employed a man to pack it for shipment. He hired other men to take it in trucks to the depot for shipment, and also provided for the use of the trucks of another in the event that his own were not available. One day his truck-driver, being unavailable, the packer undertook to drive the truck loaded with ice cream to the depot for shipment. He negligently injured another, it was claimed, while en route. The court held as matter of law, that he was not acting within the scope of his employment.

The master had, as the immediate object of the employment of this servant, the packing of ice cream for shipment. It could not be shipped otherwise. A remoter purpose was to have it shipped, for which the packing was done. The act of driving the truck was unauthorized and different in kind from the authorized act of packing the cream, but under *Loper's* case this does not take the

¹⁰133 Miss. 236, 97 So. 557 (1923).

act from the scope of employment, provided it is pertinent to the authorized conduct, and was conduct that the master might expect.

The question might be asked if the act of the servant in driving the truck to ship the cream was not just as pertinent to packing it as the act of the fireman in kicking a trespasser off of a train was to reporting his presence to the conductor. It might be asked also if the master did not have as much or more reason to expect the ice cream packer to act unauthorizedly to forward the master's object in getting the cream to the depot, than did the master to expect his servant to go against his positive orders only to report a trespasser's presence, and to kick the trespasser from the train. In each case, the servant did something he was not hired to do. In each case the servant was authorized to do some act, looking towards the accomplishment of a purpose of the master. The fireman was to report trespassers to get them off the train, the packer was to pack ice cream to get it carried to the depot and shipped. Measured by the test of the Loper case, what differentiates the one from the other?

It might be said that the master had arranged for the ice cream to be carried to the depot, in the event that the truck drivers were unable to serve, having made arrangements with a truckman to this end. It might be argued in response to this that in the trespass cases, the master had made arrangements to have the trespassers put off by another. In the trespass cases the fact that the accomplishment of the objective had been committed immediately to a different agency, did not protect from liability, and it could not have done so in the ice cream case, if the trespasser case had been followed. If this delegation of the duty to act in the given contingency was impotent in the trespasser cases, why was it potent in the ice cream case?

In *Natchez etc. Railroad v. Boyd, et al.*,¹¹ a servant was employed to pump water into a tank for the use of defendant's engines. Thinking that someone was stealing the water, he appointed his brother to watch. Believing that plaintiff was a trespasser with larcenous purposes, the brother shot and killed him.

The plaintiff having recovered in the lower court, the judgment was reversed by the Supreme Court on the ground that the act could not have been within the scope of the servant's employment had it been done by the servant himself. The court held that the terms

¹¹141 Miss. 593, 107 So. 1 (1926).

of his hiring were only to pump water into the tank; that he had no specific duty relative to guarding the water.

Non-liability was in no wise predicated on the extreme criminality of the act, making it impossible to say that it was otherwise than entirely personal to the servant.¹²

The court said:

"He was not instructed to prevent trespass from being committed on the property of the appellant; consequently, so to do was not within the course or scope of his employment unless it was within the scope of his duty to keep water in the tank. It is true that preventing water from being taken out of the tank by trespassers bore some relation to Barnett's duty to keep water in the tank, *but it bore no relation to the manner in which he was to discharge that duty*, (Italics ours.) which it is manifest from the record, was by pumping water into the tank."

Further, the court said:

"Guarding the appellant's property from trespassers is a duty so *different in character from that of pumping water into one of its tanks that a duty to do the one is not embraced in and cannot be implied from a duty to do the other*." (Italics ours.)

It appears from the quotation that the relation of the unauthorized act to the object of the master, is expressly excluded as not being material, though it is admitted to exist and it is in effect stated that the material element is the relation of the unauthorized act to the *manner* of discharging the authorized duty.

The court further holds that guarding the appellant's property to prevent the stealing of water, is a duty so different in kind from that of pumping water, that the one could not be implied from the other. Admittedly unauthorized conduct never falls within the duties of the servant, and the Loper case decides that though unauthorized and different in kind from the authorized conduct, the master still is liable if it is pertinent to authorized conduct, falls within the purpose of the master, and is something that the master might expect as not unlikely to happen.

The result might have been reached by holding that its extreme criminality prevented it from being an act which the master might

¹²See Davis, Director General v. Green, 260 U. S. 349, 67 L. ed. 299 (1922), reversing Hines, Agent v. Green, 125 Miss. 476, 87 So. 649 (1921).

expect as not unlikely to happen, but this was not the basis of the decision.

Taking the basis of the decision in the Loper case, a question arises as to the validity of the case as a guide. Hiring the servant to pump water into the tank was to have and keep the water in the tank for the use of engines. For the purpose of use, it was as necessary to keep the water in the tank until used, as it was to pump it there in the first instance. The servant was specifically hired to perform certain duties within the ultimate objective of keeping water in the tank. True, the unauthorized action of fighting off trespassers, real or supposed, was a means different in kind from that authorized, but it would seem to be well within the ultimate objective of the master, to keep water in the tank as stated by the court. It is a question whether or not in a similar case, where there was no extreme criminality committed in guarding the water, say a slight battery, the case would not now be sent to the jury. If a master could expect that a fireman would kick a trespasser from a moving train, he might expect a pump station servant to kick a trespasser stealing water from the premises.

There is a unique case, decided since the Loper case, that it might be interesting to examine somewhat. This is the case of *Singer Sewing Machine Company v. Stockton*.¹³ The facts, as recited by the court, were that an agent of the Sewing Machine Company went to the home of plaintiff for the purpose of selling her a machine. He asked her if she was interested in a sewing machine, and she said that she did not wish to buy. He then asked her for a match and followed her into a room where she had gone to get it, and there asked her if he could leave a machine with her for trial. He inquired if she were married and if she had dates. She told him that she was married and that she did not have dates. He asked if her husband worked at night, and if she ever became lonesome. She told him that she never became lonesome. He then attempted to take her by the hand. She protested and began to get excited. He told her to let him know if she wanted that machine, and said that if she would keep a date with him that he would leave a machine with her.

Plaintiff wrote a letter of protest to defendant, the master, and the agent came to the house and apologized to her for his conduct. This was the substance of the evidence for the plaintiff. Judgment

¹³171 Miss. 209, 157 So. 366 (1934).

was given against the master and on appeal it was affirmed. In its opinion the Supreme Court said:

"It appears from the appellee's testimony, which was accepted by the jury, that during this misconduct, Walker was still trying to sell appellee a machine, and his attempt to cultivate relations and make engagements with her seems to have been largely for the purpose of effecting a sale. At least the jury was authorized in so believing."

It further said:

"It was no part of the appellant's purpose or business for its agent to have dates with customers for his own private purposes, but here the conduct is so blended with the attempted sale that it is difficult to separate the conduct of the agent Walker from his business as salesman."

This case is interesting. Adultery and fornication has always held an element of interest for mankind. It has furnished the theme and tragic element in countless tragedies. It has tipped the shafts of the wit of the Rabelais of the world and inspired, at least in part, the Hamlet to his sad and homicidal end. Homer but sang the dire results of the unlawful amour of Helen and Paris. It is thundered against in the Decalogue.

By its practitioners, other than the Nymphs du Pave, it is generally considered to furnish its own consideration, value and return, but here, as far as a somewhat limited research reveals for the first time, it appears as a sales force for a sewing machine.

Were it not for the verdict of the jury and its affirmance by the court, one might doubt whether solicitation to fornication or its consummation could increase a prospective purchaser's desire for a sewing machine, and unless it did so or could have that tendency, it could be contended that no one could be held to have adopted it as a means of persuasion, with the result that it should be taken as purely personal.

It might be argued that, if the prospective customer was moral, the sale would be certainly defeated by such attempted persuasion, and if immoral, the agent would have to give the machine to the customer to accomplish the full measure of persuasion, so that after he had become thoroughly persuasive, he would have nothing to sell. Be this as it may, the jury found and the court confirmed the finding that the agent used his solicitations partly at least with the purpose of selling the machine.

Another question, and one more in accordance with the comments of this article, is whether or not this decision is not a departure from the principles of Loper's case. The acts of the agent were certainly not authorized and were, with equal certainty, different in kind from the acts which would be held to be authorized as means for the sale of merchandise. If so, then there is no liability under Loper's case and the Restatement unless the unauthorized act be both pertinent, and one that the master could expect as not unlikely to happen.

The court, in effect, held that it was pertinent to the object of selling the machine, an unauthorized sales method adopted by the agent, but done to promote a sale.

The court, in its opinion, does not deal with the last element of liability. As far as the briefs are quoted, in the report, it was urged on the court that the conduct was purely personal and from solely personal motives. The court responded to this contention in its opinion. However, this defense though good, is a different one from what the master might expect as likely to happen or not unlikely to happen. The one is the motive of the agent in doing the act; the other is what the master might expect as probable conduct by a human agency that he had used for the accomplishment of his purposes, liability being based on the notion that it is fair to hold him responsible for what a servant might probably do in connection with his business.

The attorneys in the case may have urged this. I do not know, and it may or may not have been in the mind of the court in considering the case. If not, and it had been urged, a different result might have been reached.

It has not been my purpose to persuade that any certain decision that I have mentioned is wrong or right, or to oppose any result reached. I have asked questions, and have not sought to answer them, my purpose being to show, by taking examples, the importance of consulting the Restatements on the subjects covered.

As a practicing lawyer, I would offer in conclusion a suggestion which I think, if followed, will be of great assistance to the Bar. If our Supreme Court intends to consult, and where nothing prevents, to follow the rules of the Restatements, it would be very helpful to us if applicable sections were cited in the opinions, together with such discussion as the court might consider helpful.

PROPOSED FEDERAL LEGISLATION FOR ENCOURAGING PRIVATE PENSION SYSTEMS

LEONARD J. CALHOUN*

During the consideration by the Senate of the Social Security Bill,¹ Senator Clark introduced an amendment with respect to which he stated: "The purpose of the amendment is to permit companies which have or may establish private pension plans, which are at least equally favorable or more favorable to the employee than the plan set up under the provisions of the bill as a government plan, to be exempted from the provisions of the bill"² This amendment was passed by the Senate in June, 1931.³

Because of several Senate amendments to the Social Security Bill, conference committees were appointed and the first Conference Report of July 16, 1935, reported agreement on all save the Clark Amendment, with respect to which the Managers on the part of the House stated in their report that: "Conferees are unable to agree."⁴ This was followed by a Conference Report⁵ recommending that the Senate recede from the Clark Amendment. This Report was accepted and the Social Security Bill, as finally enacted into law, did not include the Clark Amendment.

On August 9, just prior to action by the Senate on the Conference Report of August 8, announcement was made by Senator Harrison that: "while the Senate conferees receded, the Chairman of the Ways and Means Committee of the House and the Finance Committee of the Senate were authorized to appoint a committee composed of five members from each committee to study the private pension systems, ..." Senator Clark added: "There have been at work for several weeks through the kindness of the conferees, a committee of experts from the House and Senate committees, from the Treasury and Labor Departments, and from outside sources, who have made an honest, conscientious attempt to work out a measure for preserving

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¹H. R. 7260, Public 271, 74th Congress.

²Congressional Record, June 18, 1935, p. 9912.

³Yeas 51; Nays 35.

⁴Report No. 1540.

⁵Report No. 1744, August 8, 1935.

the private pension plan which would be satisfactory to everybody and would meet the objections which were made on the floor against the amendment, and at the same time carry out the purposes of the amendment. These experts have made very great headway towards such an agreement, . . . in view of the assurances given by the Chairman of the Finance Committee of the Senate and the Ways and Means Committee of the House of an immediate, complete, and thorough-going study of the subject for the purpose of affording a sufficient opportunity to preserve the rights of the employees under the private pension plan, I do not feel justified in longer holding up the passage of this very important bill. . . ."⁶

While there have been several meetings of this Joint Sub-committee above referred to, up to the present time it has made no report with respect to legislation encouraging private pension plans. The delay is largely attributable to difficulties in accomplishing the objective of preserving and encouraging private pension systems. Some of the principal difficulties will be reviewed. Preliminary to such review, it might be well to mention briefly the provisions of the Social Security Act which were to have been effected by the original Clark Amendment.

Title II of the Social Security Act provides⁷ for Federal benefits payable to those who are employed after 1936 in what might be loosely termed industry and commerce. The main feature of this Title is that it contains provisions for the payment of annuities to persons who attain the age of sixty-five, and retire. Such annuities are based upon total wages earned after 1936 and prior to the age of sixty-five. In addition, what might be termed "death benefits" are provided with respect to persons who die prior to the age of sixty-five, equal to 3½% of wages which have been paid them. A like amount is payable to certain persons whose employment periods or whose wages do not qualify them for annuities.

Title VIII of the Social Security Act imposes taxes⁸ which fall upon approximately the same group who may qualify for the benefits provided by Title II, and upon their employers. It was the contention of those who favored the Clark Amendment that the added cost of paying this tax, together with the fact that benefits are provided for employees under Title II, might encourage employers to abandon private pension plans, leaving their employees without

⁶Congressional Record, August 9, 1935, p. 13256.

⁷Sections 202, 203, and 210.

⁸Sections 801 and 804.

any private annuity or death benefit, unless some provision were made to encourage the continuance of these existing pension systems. Further, that an adverse decision by the Supreme Court would leave them wholly unprotected.

A considerable number of employers have such private pension systems providing death and annuity benefits to their aged employees. Senator Clark made the statement on the floor of the Senate that there are 4,000,000 employees now covered by such systems.⁹

The Clark Amendment¹⁰ provided in effect that where an employer had a private pension plan, approved by the Social Security Board, he would be exempt from paying any taxes under Title VIII of the Act with respect to employees under his plan. A plan would be approved and exemption allowed, upon a finding by the Board that the plan meets several conditions.

Among these conditions were that private plan "benefits payable at retirement and the conditions as to retirement shall be not less favorable, based upon accepted actuarial principles, than those provided for under section 202," and "upon the death of an employee, his estate shall receive an amount not less than the amount it would have received if the employee had been entitled to receive benefits under title II of this act."

Another condition was that the plan must be available to all employees; that contributions by employer and employee should at least equal total taxes otherwise payable; and that the employer's contribution equal at least fifty per cent of such taxes.

In case of withdrawal of an employee from the private plan or termination of his employment, or in case the Board disapproved the plan, it was provided that "there shall be paid by the employer to the Treasurer of the United States . . . an amount equal to the taxes which would otherwise have been payable . . . together with interest on such amount at three per centum per annum compounded annually."

Aside from any constitutional questions involved in exempting persons from a tax where there is an approved benefit system, and subjecting them to such tax where they have no such system, several non-legal objections existed to the amendment.

One of these is the opportunity of selection against the government. For example, while the tax which would be exempted is at

⁹Congressional Record, August 9, 1935, p. 13256.

¹⁰Congressional Record, June 19, 1935, pp. 10013-14.

the same rate for an individual, whether he is young or old, the cost of providing an annuity, like the cost of providing insurance, varies vastly with age. By the simple device of varying employer contribution rates to private plans according to age, all the expensive risks could be induced to elect federal benefits, while inexpensive risks, together with the amount of taxes otherwise payable, might be under private plans.

Further, there is the matter of shifting coverage to the loss of the Government. In many cases taxes which would be payable on discharge of an employee just prior to his reaching sixty-five will be only a small fraction of the value of the annuity payable to him.

For example:

A person earning six hundred dollars per year might be employed during the five years immediately following 1936 and then reach the age of sixty-five. This would entitle him to Federal benefits of fifteen dollars per month. With a life expectancy of six and one-half years, his total annuity would, on the average, be eleven hundred and seventy dollars. But total taxes his employer would be required to repay would be seventy-two plus 3% interest. As the employee would get the same annuity in either case, it would be quite easy for the employer to fire such employee and shift the burden of paying benefits to the Federal Government.

The above example results from the two causes: (1) the taxes under Title VIII are based on wages and no other factor and begin at a low rate in 1937, gradually increasing each three years until the eventual tax is at a rate of three times its initial rate; and (2) the annuity benefits based on wages are six times as great for the first \$3,000 total wages earned than for wages thereafter, up to \$40,000 total wages, and twelve times the rate based on wages above \$45,000.

A third objection is that of risk of loss. The amendment allows the annuity carrier to be a trustee. If the money is dissipated or unwisely invested, no money may be available to pay benefits when due. Choice was necessary as to whom such loss would fall upon—employee or Federal Government. Upon election of an employee to come under federal benefits, upon termination of his employment or disapproval of the private plan he is under, the employee is entitled to full federal benefits under the amendment. This is true though not one dollar of taxes payable by the employer with respect to the employee is recoverable by the Federal Government.

Because of the above, and many other objections to the Clark amendment, a new approach to the problem has been attempted. The result of this attempt is embraced in a substitute for the old Clark Amendment, eliminating any exemption from tax, and basing encouragement to private pension systems by federal grants-in-aid with respect to such systems. The amount of assistance is based on the amount of burden removed from the Federal Old-Age Reserve Account.

Each year what might be called the premium or actuarial equivalent is paid with respect to certain benefits carried by the private carrier. The Government is relieved of making provision in the Old-Age Reserve Account for this contracted-out benefit.

There is considerable difficulty in determining just what benefit should be contracted-out to a private carrier. As previously noted, the rate of benefit accrual with respect to amount of wages earned is six times the benefit for the first \$3,000 in wages as it is for the total wages above \$3,000 and up to \$45,000.

Private pension plans almost universally compute benefits on a flat accrual basis. That is the rate is the same for the first thousand dollars earned while under a private plan and any subsequent thousand dollars earned. The federal rate is for a monthly benefit at a rate of one-half of one per cent for the first \$3,000 of total "wages in employment" as defined in the Act, and one-twelfth of one per cent of such wages in excess of \$3,000 up to \$45,000. Average accrual for this entire \$45,000 would be at the rate of one-ninth of one per cent.

Correlation between federal and private systems is achieved by providing for a "premium" payment based on benefits accruing at one-ninth per cent per month for total wages earned up to \$45,000. This means that accruing benefits are contracted-out at a lesser rate than they are earned for the first \$3,000. At no time until a pension has earned exactly \$45,000 under a private system are all of the benefits earned while under the system contracted-out with it. After \$45,000 total wages have been earned, the contracted-out benefits are reduced to 1/24 of one per centum for wages earned. This is exactly the rate of accrual under the Federal Benefits Schedule.

The mechanics of contracting-out are, in general, as follows:

An employee elects to go under his employer's approved private annuity plan. Suppose during the first year he is under the plan he earns \$3,000 in wages, a monthly benefit of one-ninth of one

per cent per month of \$3,000 would be a monthly annuity of approximately \$3.33 per month payable for life after sixty-five. For the private plan to have been approved he will have earned at least this amount of benefit under the private plan. The employer has paid the premium for this benefit. The Federal Government makes an actuarial calculation as to the present value of this earned benefit, pays the amount thus determined to the employee. If the employee is a young man, of course, the present actuarial value of the amount of premium the employee will have paid will be small. In case the employee is old, the premium will be proportionately larger. In either case the Government relieves itself of eventually paying \$3.33 per month of the total annuity it would eventually pay the employee. If an employee's coverage ceases under the private plan he is given a paid-up annuity policy, except where the amount is very small, in which case there may be repaid its actuarial equivalent to the Government.

The fact that there is no tax exemption because of the private plan and the further fact that the Government pays out only the amount it would otherwise place in the Old-Age Reserve Account avoids the opportunity for selection against the Government previously noted as an objection to the original Clark Amendment.

In the substitute amendment, risk of loss to the Government is obviated by providing that it is relieved from paying the part of the annuity contracted-out regardless of whether the annuity carrier pays the benefit when due. Risk of loss to the person electing to go into a private plan is minimized by requiring that the annuity carrier be a life insurance company with large assets, wide territorial coverage and five years annuity experience.

It will be noted that the proposed substitute is administratively both intricate and expensive. No method was found of avoiding this if the interests of the Government, the employer, and employee are fairly safeguarded. Whether, in case the amendment is adopted, it will be taken advantage of by many employers or employees is, of course, a matter of speculation. In case an employer desires his employees to receive larger annuities than provided by Title II, he has merely to set up a system providing these additional benefits. It has been asserted by some industrialists, that this can be done at less expense than would result from taking advantage of the

proposed substitute amendment. However, it has been contended that many employers would pay this extra cost if the amendment becomes law.

Whatever may be the legislative fate of the proposed substitute, it would appear that the theory of exemption, upon which the original amendment was based, has been definitely abandoned.

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REORGANIZATION AND CONSOLIDATION OF THE UNITS OF LOCAL GOVERNMENT*

THOMAS C. KIMBROUGH** AND JAMES J. LENOIR***

Within the past fifty years much progress has been made in the field of American government. There have been administrative reforms in the national government with administrative centralization as the dominant tendency. Even our city governments which fifty years ago were termed by James Bryce as the one conspicuous failure in the American governmental system have improved to such an extent that they are now one of the best administered of all our units of government. Today the great problem for the lawyer, the political scientist, the student, and the average layman is not the city, but the other local governmental agencies, chief among them being the county. A vast network of local governmental agencies covers the United States. Varying estimates have been made as to the number,¹ but it seems that there are so many that accuracy is next to impossible. One authority informs us that there is a sum total of 175,368 local governmental units for all the states.² Of this number there are 3053 counties and some 20,262 towns and townships. In the State of Mississippi there are some 6639 local governmental units, eighty-two of which are counties. Illinois has 17,336 units of local government and California 4277.

The question may be asked, what accounts for the multiplicity of these local governmental units? There are so many because as new needs arose new units were created, but the old ones were seldom abolished. Thus, overlapping, superfluous governmental units persist

*This is part of an address delivered before the American Bar Association by Dean T. C. Kimbrough. He was assisted in the research by Dr. J. J. Lenoir, who also slightly revised the present article.

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¹Charles E. Merriam, *A Different Prescription*, STATE GOVERNMENT 1 (June, 1932), says, "There are now in the United States more than 200,000 independent governing and taxing bodies. No one seems to know within a good many thousand just how many there are, but everyone knows there are too many, and that they are very expensive."

²William Anderson, *Quantity and Quality* (1935) 8 STATE GOVERNMENT 44-45.

—districts as obsolete as the needs which called for their creation. A certain county official, in giving advice to a friend who was worried about the abolition of the office which he held, told him that the state legislature would create an office, but who had ever heard of the legislature abolishing an office unless it had to do so. A great number of these local governmental areas and agencies are provided for in state constitutions, and therefore can only be abolished by constitutional amendment.³ This has proved to be an effective deterrent to their abolition.

One phase of the problem presented by such a large number of local governmental units is the serious financial burden which it places on every citizen. In the second place, it is an irresponsible system with inefficient, unskilled administrators in charge of local affairs. However, if changes are to be made to alleviate these evils the question arises as to how they shall be instituted and enforced. The doctrine of local self-government has so long been cherished by English and American people that it has become a corner stone of their political creed, and they are likely to resent any change, no matter how desirable, if it is represented as interfering with their local rights.⁴ On the other hand, there is some ground for the contention that self-government does not actually exist even at the present time among the people in our local governmental units.⁵

Since 1912 the agitation for reform of the local governmental system has made increasing headway.⁶ Many schemes have been devised and some progress has been made. One criticism which may be directed against those who are active in the movement, however, is their failure to show the average citizen the practical value of

³See Howard P. Jones, *Constitutional Barriers to Improvement in County Government* (1932) 21 NAT. MUN. REV. 525.

⁴*Id.* at 529, ... The tradition of local self-government has always been strong in this country, however, and when the written state constitution developed as a check upon the legislature, guaranteeing certain rights to the citizen, it was only natural that the local areas of government should find their way into this document."

⁵Edward M. Barrows, *Mosquito District—There She Stands* (1934) 164 NEW OUTLOOK 42, at 43, "Briefly, genuine local self government has ceased to exist in many of these United States for years."

⁶Richard S. Childs, *"The Movement" for Better County Government* (1934) 23 NAT. MUN. REV. 499, at 500, "So now our slow and patient technical attack which began about 1912 begins to show; cracks appear in the ancient citadel. There are county managers in a few spots and more to come. Evidence of good specific performance in progressive counties ought to be coming along soon—that's something the public outside our ranks will be quick to notice, whereupon our 'movement' can begin really to move!"

reorganization and consolidation of local governmental units.⁷ This failure has retarded the adoption of needed reforms in state and local government. I do not agree with a certain state senator, a graduate of an English University, who once made the statement that the suggested plans of reorganization and consolidation of local governments were too revolutionary, and that a change would take place, but not within the next hundred years. He seemed to have forgotten the changes wrought in 1888 in the English system of government which in themselves were quite revolutionary.⁸

It is true, however, that there are certain bulwarks against change. For example, let us take the suggestion that the township governments be abolished in Illinois.⁹ On first glance this seems an excellent suggestion and one that might easily be accomplished, since there are a vast number of local governmental agencies in Illinois, and since townships of the middlewestern type—local areas some five or six miles square—would seem to be smaller than is practicable in this age of good roads and rapid transportation and communication. Yet the person who tries to carry out the suggestion soon meets with obstacles. He finds that there is a strong tradition supporting the township as a necessary unit of government, and that tradition is a strong chain around the taxpayer's neck.¹⁰ He also finds that the political parties resent any encroachment upon their private preserves, and hold tightly to each available sinecure.¹¹ Special interested groups hold to the old forms of local government. Add to this the sentiment felt by public opinion—the local pride in the township school, or the local organization—and the problem of township abolition assumes a more difficult aspect.

⁷See BROMAGE, *AMERICAN COUNTY GOVERNMENT* (1933) 6, which says, "Without militant public opinion in back of it, county consolidation makes small progress."

⁸See OGG, *ENGLISH GOVERNMENT AND POLITICS* (1929) 642-646.

⁹See the Foreword by Frank O. Lowden to the article by Howard P. Jones, *Constitutional Barriers to Improvement in County Government* (1932) 21 NAT. MUN. REV. 525. In Minnesota the legislature may authorize the dissolution of townships. See William Anderson, *Minnesota Dissolution of Townships* (1935) 24 NAT. MUN. REV. 229.

¹⁰There are some 1481 township governments in Illinois, 1602 in Iowa. In Illinois the township has control over such local governmental functions as township roads, bridges, schools, etc. See DODD, *GOVERNMENT IN ILLINOIS* (1923) 222-224.

¹¹CHILDS, *loc. cit.*, *supra*, note 6, at 500, "So the governor gets nominated if a collection of county bosses find him acceptable and they promise and deliver convention delegates or primary majorities; the legislative delegation can be reached through the county boss who sends telegrams to the capitol all through the session; the elective local judges are all but appointees of the county boss; the leaders in the villages and towns take orders from the county on everything outside their local bailiwicks."

There is no problem of government today, however, which is of greater importance or more in need of reform than that of our local governmental units. Its importance is duly emphasized by the fact that the expenditures for local government in 1929 were ascertained to be \$7,126,000,000—a billion dollars more than the combined cost of state and national government.¹² Criticism is often made of expenditures in state and national government, and the searchlight of publicity is thrown upon such expenditures. How much waste might be eliminated if such publicity were also given to the expenditures of county and other local governmental units! Only recently the papers carried the story of a county treasurer who was in debt to the county in the amount of \$400,000 and no one had known of this until an incoming treasurer demanded an audit of the books.¹³

In this paper I wish to advocate economy and efficiency in the 175,000 or more local governmental units in our country. Yet no matter how economical they might be, the problem would be only half solved if the same old, obsolete areas of local government were kept unchanged. For the past five years the studies made of state and local government have pointed to only one solution which will extricate us from the labyrinth of useless governmental units in which we find ourselves.¹⁴ That solution is a gradual education of the public by progressive and well informed leaders in whom it has confidence to the idea of reorganization of local government—abolishing some units, consolidating others, and, if need be, setting up entirely new units, so that an efficient working organization may result. This process must necessarily be gradual. Yet it will mean, in the long run, efficient, modern systems of government, and some day we will look back upon these age-worn areas of local government and wonder that a civilized people could tolerate them for so long. Students of government condemn this present “welter of obsolescence and special privilege that has its roots in every community” as much

¹²BROMAGE, *op. cit.*, *supra*, note 7, at 4, “Local government is no small item in the official budget. The National Industrial Conference Board has ascertained that the combined, gross governmental costs in this country, in 1929, were \$13,048,000,000. Of this total, the federal government spent \$3,932,000,000; the state governments, \$1,990,000,000; the local governments, \$7,126,000,000.”

¹³Chicago Tribune, June 9, 1935, 1, col. 1.

¹⁴See the surveys made by the Brookings Institution in Mississippi and Alabama in 1932, that of the Institute of Public Administration of New York City submitted to Franklin D. Roosevelt in 1932, the Brookings Report to Governor O. Max Gardner of North Carolina in 1930, the report of the Virginia Commission on County Government in 1932, the report of the California Commission on County Home Rule to Governor C. C. Young in 1930, and other surveys and reports.

as you, as practical lawyers, condemn the justice of the peace—the blind jackass of local (governmental) justice.

The greatest difficulty in bringing about any change springs from the political control of the local governmental officials by the local bosses. Our entire political system has nuclei in our local governments.¹⁵ State politics, and national politics to a certain degree, are entirely dependent upon the little political boss who controls some small area of local government. A united front presented by a number of these politicians can prevent legislators from carrying out constructive legislative policies. It is doubtful whether there is much difference between a politician in one state and one in another—they all have one thing in common, that is, the continuance of the old system.

Local bosses follow the local crowds of voters. And those voters place in office the local vote getter, irrespective of that individual's ability as an administrator. This results in a system of inefficient officials, many of whom are responsible to no one but themselves. There is seldom any effective checking of the accounts of these local officers,¹⁶ and they continue to hold their jobs with careless inefficiency until time or another vote getter displaces them. The system has become so entrenched that it will be hard to remedy. In Mississippi this past summer some 10,000 candidates were clamoring for election to public office—an average of five to eight candidates for each position. Add to this number those who plan on some day running for office, and the relatives of those holding or wishing to hold these highly sought offices, and you will probably well nigh give up all ideas of reorganization of local government. Yet the situation is not absolutely discouraging, as I will presently show.

In any discussion of the problems of local government serious attention must be given the county, as it has been the chief object of criticism, much of it well founded.¹⁷ Counties as institutions of local government are far older than our nation, dating back to ninth century England.¹⁸ The Calverts, the Penns, Oglethorpe and others set up county governments in this country. No one can seriously

¹⁵CHILDS, *loc. cit.*, *supra*, note 6.

¹⁶BARROWS, *loc. cit.*, *supra*, note 5, at 46, "For the first time in the history of scores of counties, adequate accounting systems are being installed, departments are being budgeted, civil service is being urged as far as state laws will permit and the principle of technical jobs is becoming commonplace."

¹⁷GILBERTSON, *THE COUNTY, THE "DARK CONTINENT" OF AMERICAN POLITICS* (1917).

¹⁸See HARRIS, *LOCAL GOVERNMENT IN MANY LANDS* (1926) 167.

contend that the county has not served a beneficial purpose.^{18a} When we broke away from England we maintained existing governmental institutions and the county served as a valuable agency of local government. Today the same type of county persists. The area is about the same, or may be smaller; the offices of the county vary but slightly from those first set up. As one critic has pointed out, "The Duke of York could have felt perfectly at home in the America of Franklin Pierce's day though the railroad might have awed him somewhat. But both the Duke and the President would be bewildered and helpless by a day in a modern American community, except in the court house. . . . In no other phase of life would they understand either the institutions or the common implements of being."¹⁹ Critics in textbooks, newspapers, and elsewhere call it the ox-cart government of today. It seems to the writer that the type of county government found in some of our states in fact antedates the ox-cart. Within the past five years private research institutions, state legislators, and various societies and organizations have made extensive studies in local government.²⁰ Though they do not agree as to the precise method to solve the problems which they find, all seem to be impressed with the inefficiency and waste in the average county government. There is no doubt that the most conspicuous failure in the present American governmental system is the county.²¹

In the first place, the number and size of our counties is adapted to antiquated conditions. There are some 3000 or more counties

^{18a} "It has long been contended by observers and is now generally admitted that the reasons which in pioneer days existed for county government have ceased to exist. Good roads, rapid communication and transportation methods, the tendency to concentrate governmental activities for efficiency purposes have relegated the old system to the rear. Every system of business administration in private industry has changed time and again and is constantly changing, and yet public administration proceeds along the same lines as it did a hundred years ago." Editorial, "County Government," *Memphis Commercial Appeal*, May 14, 1936.

¹⁹ BARROWS, *loc. cit.*, *supra*, note 5, at 43.

²⁰ See *supra*, note 15. Jones, *Progress in County Government: a Bird's Eye View* (1934) 23 NAT. MUN. REV. 502, 504. "A number of states have commissions studying the problems of reorganization of county government. These include Connecticut, Illinois, Indiana, New York, North Carolina, and Ohio. In other states commissions have already reported—among the recent reports was that of the Michigan Commission of Inquiry Into County, Township and School District Government which came out strongly for complete reorganization of county government and the establishment of the manager plan."

²¹ CHILDS, *loc. cit.*, *supra*, note 6, at 499, "In this crusade we attack with our technical sapping operations the most stubborn citadel of political bossism. For in your state, I think, as in mine, the county is the unit of the political machine outside of the great cities."

with an average area of probably 600 square miles,²² each with a county seat which in most cases the founders were careful to locate within easy reach of all county residents traveling by horseback. The county has failed to adjust itself to the automobile or to modern methods of communication. This fact alone makes the county an expensive, inefficient unit of government. Instead of having several sets of county officers, and several county court houses, would it not be better to have a greater degree of centralization with a larger county unit? The saving in dollars and cents alone would be enormous. We note from one study that "in a few states—California, Florida, Iowa, Mississippi, and Ohio—county costs bulk larger than state costs, while in thirteen states they amount to more than 75 per cent of the state costs."²³ It is this necessary cost, coupled with the lack of responsibility in present county government that are the chief objects of criticism.

The internal administrative structure of the county is as obsolete as the county itself. The entire administration of such state activities as schools, highways, drainage, etc., by local governmental units has resulted in waste and extravagance. For example, the county jail has always been a disgrace to this country. One eminent writer says that "to find a parallel it is necessary to go back to Turkey and the thirteenth century."²⁴ The inmates of the county jails are too few in number for modern humane and economical administration. Instead of county jails there should be either regional or state institutions. This same criticism applies to county almshouses. Virginia has recently substituted for the county almshouses ten for the entire state. We are informed that "the inmates are better cared for than ever before, with an average cost per capita of but little above one-half of the original cost."²⁵

If county government is to be improved it would seem that there are one or more of several possibilities: (1) change in the form of government; (2) change in the area of government; (3) change in the functions of the county; (4) abolition of the county; and (5)

²²FAIRLIE AND KNEIER, *COUNTY GOVERNMENT AND ADMINISTRATION* (1930) 64. See also, Manning, *Costs of Counties* (1934) 7 *STATE GOVERNMENT* 248. Note the chart on p. 249 indicating the average county area in each state.

²³MANNING, *loc. cit.*, *supra*, note 22, at 248. "On the other hand, in some states—particularly in the northeast—county expenses are comparatively insignificant when measured against state expenses and often amount to less than 10 per cent of the latter. The most extreme instance is afforded by Rhode Island where county finances are administered entirely from the state treasury."

²⁴From Foreword by Frank O. Lowden, *loc. cit.*, *supra*, note 9.

²⁵From Foreword by Frank O. Lowden, *loc. cit.*, *supra*, note 9.

improvements in administrative methods.²⁶ Actual suggested reforms have been in the direction of home rule, county manager form of government, departmentalization, mergers, and consolidation. There seems to be a wide gap, however, between what the experts know and just what they can get the public to accept.²⁷ This is another problem the solution of which will mean the realization by the public of the general faults of county government. In order to educate the "Grand Canyon of Ignorance" it is necessary for the experts and those seeking better and more economical local government to organize. Thus county reform is a practical problem. Perhaps the strongest appeal to the average voter is to his pocketbook. There is not much doubt in my mind but that the average farmer would accept reorganization if he were convinced that it would mean a saving of tax dollars. The difficulty is in convincing the rural voter of the advantage of change. A direct, educational appeal to the rural voters has never been made in most states. If it were made and pushed by the leaders of the state I for my part do not doubt the outcome.^{27a} At present, reorganization is seemingly a dead issue in Mississippi because of a vacillating policy among some leaders and doubts held by others as to its practicability.

Most encouraging, however, to those advocating local government reform are the appeals for such reform made by prominent public officials, and the growing realization by the states themselves of the need for studying local governmental problems and instituting necessary and desirable changes. Ex-governor Lowden recently condemned in no uncertain terms the county with all its evils.²⁸ Franklin D. Roosevelt, as governor of New York, also attacked the problem.²⁹

²⁶See JONES, *loc. cit.*, *supra*, note 9. "The extent to which state constitutions impose obstacles to the flow of county governments in any of these various directions without constitutional amendment must be taken into consideration."

²⁷Editorial Comment, *The Grand Canyon of Ignorance* (1935) 24 NAT. MUN. REV. 3. "The gap between what the experts know and what they can get the public to accept: wherever problems of governmental reorganization and the professionalization of the public service are discussed, it is this great breach that inevitably becomes the final focus of the conversation."

^{27a}"Governor White (Mississippi) is apparently interested in possible reforms in the county government of that state. On May 11, 1936, he met with the committee of legislators and business men (committee authorized by the Legislature to study county government) advising them that he plans to use the information obtained by the group in working out his program for the balancing of agriculture with industry, which he will reveal at the June 12 meeting of the Mississippi Press Association at Gulfport." *Memphis Commercial Appeal*, May 12, 1936, p. 13.

²⁸JONES, *loc. cit.*, *supra*, note 9.

²⁹The New York Times, March 1, 1932, cited by BROMAGE, *op. cit.*, *supra*, note 7, at 201.

When he became a presidential candidate he discussed it in one of his campaign speeches in the Middle West, declaring in favor of "a national movement to reorganize local government in the direction of eliminating some of the tax burden which now bears so heavily on farms. There are too many taxing districts, too many local units of government, too many unnecessary offices and functions. The governmental underbrush which has sprouted for years should be cleared away."³⁰

The states themselves have increasingly realized the need for studying local governmental problems.³¹ Commissions of the state legislatures have been studying the question of county reorganization in Connecticut, Illinois, Indiana, Massachusetts, New York, Ohio, South Carolina, and Tennessee.^{31a} Committees of state-wide organizations have been making similar studies in Alabama, Georgia, Maryland, and New Jersey with a view to the reorganization of county government in their respective states.³² Recently a constitutional amendment was proposed in California for the direct abolition of the existing fifty-eight counties and their replacement by eleven new ones after July 1, 1938.³³ In addition to proposals for the reduction of the number of existing counties there is some sentiment in favor of giving the legislature more power and control in certain local matters. In nearly every state in the Union public attention is being directed toward the county.^{33a} One writer informs us that in 1933 there were about 3000 organizations at work on the problem of reorganization. "They were reenforced by special tax committees from Chambers of Commerce and various civic organizations which became increasingly valuable as the fight developed into situations that the original sponsors could not foresee."³⁴

A formidable obstacle to county reorganization and reform is the fact that in most states the legal position of the county is defined

³⁰The New York Times, Sept. 15, 1932, cited by BROMAGE, *op. cit.*, *supra*, note 7, at 13.

³¹Editorial Comment, *Along the Government Battle Front* (1935) 24 NAT. MUN. REV. 5.

^{31a}"The 1936 session of the Mississippi Legislature authorized a joint committee to make a complete survey of county government in Mississippi for the sake of economy and efficiency." See the *Memphis Commercial Appeal*, May 12, 1936. See also (Oregon), (June, 1935) 24 NAT. MUN. REV. 353; (New Jersey) *id.* 483; (Indiana) *id.* 486.

³²Editorial Comment, *loc. cit.*, *supra*, note 31.

³³Victoria Schuck, *California Local Government Proposals before the Legislature*, 24 NAT. MUN. REV. (1935) 230-231.

^{33a}New York is at present leading the way for reform in county and local government. See Chubb, *County Government Progress in New York State* (Feb., 1936) AM. POL. SCI. REV. 90-96.

³⁴BARROWS, *loc. cit.*, *supra*, note 5, at 42.

in some detail by the constitution.³⁵ Any change would thus, in most cases, necessitate constitutional amendment. Some have suggested reform in internal structure if there is no possibility to reorganize all along the line. But any administrative reform without constitutional changes will probably result in a false economy through the abolition of essential services while retaining the constitutional sinecures useful for vote getting. Most of the county officials are provided for by the constitution. For example, among the county officials specifically provided for in the Mississippi constitution are the following: sheriff, coroner, assessor, surveyor, clerks of courts, members of the board of supervisors, constables, "and all other officers exercising local jurisdiction therein."³⁶ An analysis of the duties of these various officials would result in the conclusion that a number of them are antiquated and obsolete. But the legislator is in most cases powerless to remedy the situation. An amendment to the constitution to abolish any one office would need the active support of a number of progressive men and organizations. State wide organizations of boards of supervisors and other county officers are likewise stubborn obstacles in the pathway of modernization of county government.

In some states constitutional amendments have been adopted for the purpose of providing for better county government. The Ohio constitution was amended in 1933 so as to permit the drafting of charters under a county home rule amendment.³⁷ It does not appear, however, that any state has gone as far as the revised Model State Constitution in permitting county government reform. In the Model Constitution four opportunities are provided, first, for the legislature to work out improved systems of county government and make them available to counties; second, for individual counties to solve their own difficulties by drafting their own charters; third, for an improved distribution of functions as between existing municipalities and counties; and fourth, for city-county consolidations.³⁸

During the past year there have been some setbacks in the attempt to change state constitutions to permit county reorganization and

³⁵JONES, *loc. cit.*, *supra*, note 9, at 525. There are 14 states that have constitutional provisions recognizing counties as legal subdivisions of the state. Of course, in those states, counties could not be changed or abolished without constitutional amendment. There are other subterfuges in state constitutions that serve as barriers to any change in the form of county government.

³⁶JONES, *loc. cit.*, *supra*, note 35, at 538. See also, ETHRIDGE, *MISSISSIPPI CONSTITUTIONS* (1928) 255-258.

³⁷The United States News, Monday, Oct. 22, 1934, 9.

³⁸See JONES, *loc. cit.*, *supra*, note 9, at 535-536. However, New York is taking the lead in county reform. See *supra*, note 33a.

reform. A county home rule amendment to the constitution of Michigan was rejected.³⁹ Texas voted down eight proposed amendments relating to county reorganization, consolidation of certain county offices and abolition of the fee system in paying public officials.⁴⁰ These failures probably indicate the citadel behind which the local county politicians are entrenched and thus call more and more for an organized public opinion against the present system of local county government.

Let us now examine in more detail the various schemes which have been suggested for county reorganization and reform. It seems safe to say that the county manager plan is no longer on trial, but has definitely proved its value. By 1933, six counties in three states had adopted a form of government with a single responsible executive. These were Sacramento and San Mateo Counties, California;⁴¹ Albermarle, Arlington, and Henrico Counties, Virginia⁴² and Durham County in North Carolina.⁴³ There were at the same time movements in a number of other states for the adoption of the county manager plan. Just as city manager plans have, in certain cases, materially improved municipal government it is thought by students of government that the county manager plan will partly solve the problem of county government.

It has likewise been suggested that counties might solve their own governmental problems by drafting systems of government

³⁹The United States News, "What the States are Doing," Nov. 26, 1934, at 5. See also, BROMAGE, *The Michigan Amendment to Reorganize County Government* (1934) 28 AM. POL. SCI. REV. 1084. The rejected amendment in Michigan proposed to make it "possible for county citizens to draft a county charter eliminating obsolete offices and setting up a form of government suited to local needs." See the United States News, "What the States are Doing," Oct. 22, 1934, at 9. A Home Rule Amendment was proposed by the most recent legislature and will be placed on the ballot in November, 1936. See Bromage, *Recent Trends in Local Government in Michigan* (Feb., 1936) AM. POL. SCI. REV. 103.

⁴⁰The United States News, November 26, 1934, 5.

⁴¹See Cottrell, *Local Government Progress in California* (1934) 28 AM. POL. SCI. REV. 1084.

⁴²George W. Spicer, *Virginia's Progress in County Government* (1934) 28 AM. POL. SCI. REV. 1074, at 1077. Since the enactment of the Optional Forms Act of 1932, "referenda on the plans therein provided have been held in five counties. In two of these, the county manager plan was defeated and in one the executive plan was defeated. In Henrico and Albermarle counties, the county manager plan and the county executive plan, respectively, were adopted and have been in legal effect since January, 1934." It is said that there had been a reduction of 26 per cent in the general county levy provided in the new budget of Henrico county, and 40 per cent in Albermarle county.

⁴³See Jones, *Progress in County Government: A Bird's Eye View* (1934) 23 NAT. MUN. REV. 502, 503.

somewhat on the order of the home rule plan for cities.⁴⁴ The drafting of their own charter or constitution in conformity with certain constitutional principles would throw the responsibility more directly upon the voters of the county. The successful application of this plan to certain municipal governments leads one to hope that it would prove equally successful for counties where there are similar circumstances and similar problems.

Another solution which has been presented for overlapping local governments is city-county consolidation. In 1916, Denver and Arapahoe County, Colorado, were consolidated. This consolidation is said to be "one of the most successful in the country."⁴⁵ A more recent example of the elimination of overlapping governments is the consolidation of the city of Jacksonville and Duval County, Florida.⁴⁶ In some cases where city-county consolidation apparently was impossible there have been attempts to consolidate offices. In 1934, Montana voters amended the state constitution to permit the consolidation of county offices.⁴⁷ Recently Milwaukee voted to have its aldermen represent it on the county board, and thus reduce the number of elected officials. Consolidation of duplicating service departments within the metropolitan area was also voted by Milwaukee County.⁴⁸

There has been some agitation for county mergers, a process by which counties might join together for any of a number of reasons, *i. e.*, the county is too small for efficient government, it does not conform to a trade area, it does not have sufficient taxable wealth, etc. It would appear that convincing arguments might be presented in favor of mergers especially in those states in which the average county has an area of less than 400 square miles. Yet, though there has been much discussion of county mergers for a number of years there have been only two or three specific examples. Hamilton and

⁴⁴See Jones, *Constitutional Barriers to Improvement in County Government* 21 NAT. MUN. REV. 525, 535-536.

⁴⁵Harvey, *Colorado-Denver: An Example of City-County Consolidation* (1935) 24 NAT. MUN. REV. 229-230.

⁴⁶The United States News, "What the States are Doing," Nov. 26, 1934, at 5. However, the charter of consolidation failed to win the approval of the electorate. "Popular inertia and political opposition caused the defeat of the proposed charter consolidating Jacksonville and Duval County, Florida, into one city government." Reed (June, 1935) 24 NAT. MUN. REV. 402. "Voters in Los Angeles County voted to permit the county to perform municipal service for any California city desirous of contracting therefor. The county offices of collector and treasurer were also consolidated."

⁴⁷*Ibid.*

⁴⁸The United States News, Nov. 26, 1934, 5.

James Counties, Tennessee merged in 1919.⁴⁹ James County was a small, poor county, and under the authority of the legislature it voted to join the much richer and more thickly populated Hamilton County, in which is located the City of Chattanooga. Campbell and Milton Counties voted to become a part of Fulton County, Georgia, in 1932.⁵⁰ Yet, although the Constitutions of Idaho, Minnesota, Montana, Nebraska, South Carolina, and Virginia permit counties to merge, no counties in those states have taken advantage of the opportunity offered.⁵¹ The reasons are apparent—local pride, tradition, a rich county refusing to join with poor counties, heavy indebtedness of one county, etc.⁵² It seems apparent that this system has not met with the success expected.

There are two distinct and opposing tendencies which may be noted in the various movements for county reorganization and reform—one is for a strong county, the other for state centralization.⁵³ Centralization is a trend toward the centralization of all rural services in the hands of the state and thus abolishes the county or amputates its present functions. The strong county plan is a trend toward making the county a powerful governmental organization, subordinate to the legislature with certain constitutional limitations on that body. It looks to a county of sufficient area, population and assessed valuation "to be able first, to support the services it requires, and second, to furnish the basis of an efficient administrative organization."⁵⁴ The internal administrative structure of this county is to be adjusted according to the governmental needs of the state, the better opinion being that in most cases the manager plan or county executive with responsibility is essential.

Centralization has been tried with some success. North Carolina was the first state partially to adopt this system in dealing with local

⁴⁹Erdman, *To Merge or Not to Merge* (1935) 8 STATE GOVERNMENT 37-39.

⁵⁰BROMAGE, *op. cit.*, *supra*, note 7, at 215, 216, 217, 218.

⁵¹See Erdman, *loc. cit.*, *supra*, note 49, at 37.

⁵²In Mississippi there are counties with two-county seats and it has been nearly a superhuman task to eliminate one of them. See Ethridge, *op. cit.*, *supra*, note 36, at 451.

⁵³See Jones, *Unrest in County Government*, 21 NAT. MUN. REV. 469, 471-472.

⁵⁴*Id.* at 472. See The United States News, November 26, 1934, at 5, "In South Dakota, the financial incapacity of county government has received a notable demonstration. Of the States' 64 counties, all but 11 were delinquent to a total amount of \$1,007,000 in interest on permanent school fund bonds, as of November 13."

government.⁵⁵ It presents one of the most promising methods of improving county government. The state of North Carolina took from the county many of its former functions. For example, all roads became state roads and were thus subjected to state control. The legislature centralized the administration of public services, previously of a local nature, in the administrative departments of the state government. So enthusiastic were some of the students of local government over the success in North Carolina that they looked upon it as the one solution of the county government question. They pointed out that it permitted an equalization of the tax burden hitherto impossible, since the costs of certain governmental services such as charities and highway construction bear no constant ratio to population, area, or assessed values. One writer went so far as to predict that under the centralization tendency in North Carolina the county "will gradually fade from the picture (if it has not already done so)."⁵⁶

There is no doubt that the North Carolina attempt has some distinct advantages, although it is too soon to make an unprejudiced evaluation as to its success. Virginia has followed a somewhat similar system of centralization. In 1928, the Virginia constitution was amended providing that "the general assembly may by general law provide for complete forms of county organization and government different from that provided in this article (Art. 7), to become effective in any county when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon."⁵⁷ Under this constitutional provision the state legislature in 1930 appointed a commission to study county government. This commission reported in 1932. It characterized

⁵⁵See Betters, *North Carolina Centralizes*, 21 NAT. MUN. REV. 493, 498. Note the comments made by Kirk H. Porter, *County Government and State Centralization*, 21 NAT. MUN. REV. 489, at 492. "Finally, it may be said that it is only through some scheme of moderate centralization that we will ever be able to equalize tax burdens—a problem that is of very great importance. The costs of government service such as charities and highway construction, for instance, bear no constant ratio to population, area, or assessed values. The only way to adjust unequal burdens when they exist is through the state. A moderate degree of centralization obviously would greatly facilitate these needed adjustments."

⁵⁶Betters, *loc. cit.*, *supra*, note 55, at 498. C. W. Tooke says in his review of *State Centralization in North Carolina* (Edited by Paul V. Betters, 1932), "The methods of reorganization of governmental agencies by North Carolina to meet the situation constitute without question the most valuable contribution to practical governmental reform within the past decade." 10 N. Y. U. L. Q. REV. 106 (1932). See also Wager, *State Operation Saves Money in North Carolina*, 28 AM. POL. SCI. REV. 1078 (Dec., 1934).

⁵⁷See Spicer, *Virginia's Progress in County Government* (1934) 28 AM. POL. SCI. REV. 1074.

the organization of county government in the state as "inevitably inefficient, wasteful, and irresponsible: inefficient because of a cumbersome, over-elaborate, and disintegrated administrative mechanisms; wasteful because of overlapping, obsolete, and useless offices and agents; irresponsible and undemocratic because the people have no direct representation today with sufficient power to plan and direct the policies of the county.⁵⁸ Acting under the recommendations of this commission Virginia set up the Optional Forms of Government Act of 1932. Counties may select by popular vote a business manager or chief executive. Five counties have voted on one of these two forms, but only two have voted to accept.⁵⁹

The Virginia plan of centralization seems to follow both trends—the centralization of the administration of poor relief and other functions formerly exercised by the county, while at the same time it offers to the counties the executive or county manager form of strong county government. Those who believe that the county still has a practical function to perform prefer the Virginia plan to the North Carolina plan of complete centralization. They do not approve the complete surrender of local self-government in county affairs, thus they advocate the renovation of county government rather than its complete abolition.

Although the centralization plan in North Carolina is still in the experimental stages a recent evaluation indicates a vast saving in the administration of schools, roads, and the convict labor system since they are under the control of the state. It was said in December, 1934, "The counties of the state have been enabled to cut their tax rate from an average of \$1.64 per \$100.00 of assessed value in 1930 to an average of 88 cents last year. This is along with a reduction of about 30 per cent in the assessed value of property. Stated differently, county and school taxes borne by property have decreased from a peak of about \$45,000,000 to not more than \$20,000,000 at the present time. If this reduction has been achieved at the cost of some surrender of local self-government most people seem satisfied with the exchange."⁶⁰

Another system of local reorganization which has been frequently advocated is that of county consolidation. In its simplest form it means that two or more counties combine to become a single unit of government with one set of county officials and one county court-

⁵⁸See Spicer, *loc. cit.*, *supra*, note 57, at 1075.

⁵⁹*Id.* at 1077.

⁶⁰Wager, *loc. cit.*, *supra*, note 56, at 1081.

house.⁶¹ Although this form of reduction has been widely advocated by officials and students of government, little has been accomplished because it is apparently the most difficult to "put over." The greatest opposition to consolidation is from the political organizations of the state who present many arguments against this system of reorganization. A member of the board of supervisors argued strongly against the consolidation of certain counties in the state of Mississippi advocated in the Brookings survey of that state. He criticized the Brookings survey as purely theoretical, and declared that since consolidation would mean the centralization of a courthouse it would mean the construction of a new one. This, he maintained, would in turn necessitate the building of many new roads to the new courthouse—which in Mississippi is the hub to which the spokes (roads) all point. This would mean more expense in road building, and also entail the purchase of more gasoline to get to the new county seat, and an additional wear on the car, so that "dern it, the idea is not worth trying."

There is no doubt that the center of the opposition to consolidation is the present county official who doesn't wish to lose his office. The appeal must be to the taxpayer, for as was said of the new centralization tendency in North Carolina there may be some grumbling at change and against change, but when the American taxpayer is thoroughly convinced of the savings to be obtained there is little doubt of the outcome.⁶²

The Brookings Survey of the Organization and Administration of State and County Administration in Mississippi, 1932, presented some excellent reasons why the state should consolidate some of its local governmental units.⁶³ For instance, the report gave as one example the combination of Sharkey and Issaquena Counties which would create a consolidated unit of 828 square miles in area, with a 1930 population of 19,611 and an estimated true valuation for 1927 of \$20,441,825. The report predicted that consolidation would permit Sharkey and Issaquena Counties to reduce their combined administrative costs by one-quarter or one-third, and yet give better public service.⁶⁴ The report also recommended five consolidations of two counties each, five of three counties and one merger of four

⁶¹BROMAGE, *AMERICAN COUNTY GOVERNMENT* (1933) 199.

⁶²See *Betters, loc. cit., supra*, note 56, at 498.

⁶³See BROMAGE, *op. cit., supra*, note 61, at 204.

⁶⁴Report on a Survey of the Organization and Administration of State and County Government in Mississippi (1932) Chapter 42.

counties. The survey suggested a reduction from eighty-two to fifty-seven counties.

Consolidation looks to larger areas for the county, a larger county population, better road systems, better almshouses, schools, jails, and courthouses—also to better and more responsible administrators, who are skilled in carrying on the administrative work of the county.

Many students of local government have looked favorably upon the consolidation of counties, but have deemed it impracticable.⁶⁵ They consider it next to impossible to secure the consent of the voters for even such an apparently simple thing as the moving of the county seat to another county.⁶⁶ Others regard county consolidation as a possible solution, but a slow one.

It is here submitted that county consolidation is a practical solution of our county governmental problem. It may not be the best method of eliminating county governmental waste in all the states in which the county is the main cog in the local governmental machinery, but the alternative in such cases is the centralization of such local governmental functions in the state government.

Thus, home rule, county managers, county executives, departmentalization, districting, consolidation, and centralization are at present the main issues in county affairs. They entail changes in the legal position of the county, in its administrative structure, and in its area. Though the critics may shout that county reorganization and reform are hopeless day dreams we can answer their charge by pointing out that in the last two years two other changes in government have occurred which up to that time most of us had declared to be impossible, *i. e.*, the repeal of the eighteenth amendment and the changing of a state constitution in order to set up a unicameral legislative body. It should not be claimed that any desired reform in government is impossible. If the need for consolidation and reorganization in local government are sufficiently acute, an organized public opinion will make them practical.

⁶⁵Note Porter, *County Government and State Centralization*, 21 NAT. MUN. REV. 489, at 491, "As a solution for this, and many other problems, some reformers are advocating county consolidation. But the day for that is certainly in the very far distant future. It would involve political disruptions little short of revolutionary. It is most impracticable."

⁶⁶See Jones, *Unrest in County Government*, 21 NAT. MUN. REV. 469, 470-471. Also, Jones, *loc. cit.*, *supra*, note 44, at 533, 534.

RATE CASES, VALUE, AND THE SUPREME COURT

WILLIAM PETTIT*

In no class of cases has the supreme court of the United States so continually and sharply divided as in cases dealing with rates charged by public utility companies. Over a period of fifteen years, the dissents to the method used by the majority of the court in finding the rate base on which a fair return is allowable have been both consistent and well-considered. Yet recent cases indicate that the majority of the court still adheres to the rule laid down nearly forty years ago and will not be moved by arguments of dissenters.

Rate litigation determines what rate of return on investment the utility is entitled to earn, the basis of calculation being the "fair value" of the property used for the convenience of the public.¹ Not only is the fair value of the complainant company at issue. Determination of reasonable rates for one utility may necessitate a valuation of an affiliated corporation in order, for example, to determine if prices paid the affiliate are reasonable and thus allowable as an operating expense of the complainant company.²

It is well to point out in any discussion of rate cases that the ascertainment of fair value of a utility plant is not controlled by artificial rules.³ Moreover, the determination of present value is not an end in itself.⁴ Before taking legal action to prevent imposition of allegedly confiscatory rates, the utility company ought to test the newly imposed rates. As early as 1909, the Supreme Court indicated its view of the importance, in any but a very clear case, of subjecting

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¹*Smyth v. Ames*, 169 U. S. 546 (1898). The capital prudently invested in the enterprise has been advocated as the proper rate base. *Southwestern Bell Telephone Co. v. P. S. C.*, 262 U. S. 276 (1923). "*Smyth v. Ames* is not a fixed star showing the way to a sound rate basis but merely a will-o-the-wisp leading, the explorer into a morass of shifting uncertain valuations." Richberg, *A Permanent Basis for Rate Regulations* (1922) 31 YALE L. J. 263.

²*Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 290 (1934); *Columbus Gas & Fuel Co. v. Same*, 292 U. S. 398 (1934). See also *Western Distributing Co. v. P. S. C. of Kansas*, 285 U. S. 119 (1932).

³*Simpson v. Shepard*, 230 U. S. 352 (1913).

⁴"Its purpose is to afford ground for prediction as to the future. It is to make possible an 'intelligent forecast of probable future values' in order that the validity of rates for the future may be determined." *Los Angeles Gas & Elec. Corp. v. R. R. Commission*, 289 U. S. 287 (1933).

prescribed rates to the test of practical experience before attacking them in court.⁵ For rates initially confiscatory may ultimately be compensatory, and if rates are to be imposed with future operations of the company in mind, then it is reasonable to subject them to actual test. Where a court has declared rates to be unjust and confiscatory, it should not attempt to fix what it thinks will be reasonable rates. In *Newton v. Consolidated Gas Co. of N. Y.*,⁶ the lower court fixed a temporary maximum rate for sale of gas at \$1.20 per 1,000 cubic feet. The supreme court said:

"Rate making is no function of the courts and should not be attempted either directly or indirectly. After declaring the 80-cent rate confiscatory, the court should not have attempted, in effect, to subject the company for an indefinite period to some unknown rate to be proclaimed in the future upon consideration of conditions then prevailing."

As to the reasonableness of rates in general, the court has said:

"A commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate. The mere fact that a rate is non-confiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate."⁷

A company cannot be asked to make up the difference between its actual net earnings and the amount that would constitute a reasonable return by deducting such amount from its annual depreciation allowance and ultimately from a depreciation reserve account.⁸

⁵*Lincoln Gas & Electric Light Co. v. Lincoln*, 250 U. S. 256 (1919).

⁶258 U. S. 165 (1919).

⁷*Banton v. Belt Line Railway Corp.*, 268 U. S. 413 (1925).

⁸*Board of Public Utility Comrs. v. N. Y. Telephone Co.*, 271 U. S. 23 (1926).

⁹In the *Southwestern Bell Telephone Co.* case, *supra*, note 1, it was said, in the dissenting opinion, that the "rule of *Smyth v. Ames* sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. . . . There is another potent reason why under the rule of *Smyth v. Ames*, the room for difference in opinion as to the present value of a utility is so wide. The rule does not measure the present value either by what the utility cost to produce, or by what it should have cost, or by what it would cost to reproduce, or to replace it."

No one method of estimating the value of a utility for purposes of rate-making can be slavishly followed, yet the relevant facts to be considered were announced almost forty years ago by the court in *Smyth v. Ames*.⁹ The court said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation . . . must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

The reason for taking the fair value of the property rather than what the company paid for it or what it estimates its value to be is clear. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property.¹⁰

RELEVANT FACTS IN FINDING VALUE

Finding the fair value of utility property may result from ascertaining the reproduction cost new less depreciation.¹¹ Yet the cost of reproduction may be just one factor, among others, to be considered. The original (actual) cost or the historical cost (sometimes termed prudent investment) may more nearly represent the fair value of the plant.¹² All relevant facts including capitalization and book cost should be considered. Recently, in a case involving validity of rates charged by a bridge company, original cost of the bridge

¹⁰*San Diego Land & Town Co. v. National City*, 19 S. Ct. 804 (1899).

¹¹"While current reproduction cost may be said to be an element in the present value of property in the sense that it is 'evidence properly to be considered in the ascertainment of value' *Standard Oil Co. v. Southern Pacific Co.*, 268 U. S. 146, it is clear that current cost of reproduction higher than the original cost does not necessarily tend to prove a present higher value. Often the fact of higher reconstruction cost is without any influence on present values." *St. Louis & O'Fallon Railway Co. v. United States*, 279 U. S. 461 (1929) (dissent).

¹²Historical cost is the amount which normally should have been paid for all the property which is usefully devoted to the public service. It is sometimes termed the prudent investment.

was held to indicate its fair value. The court concluded that the trend in prices from the time the bridge was built until the time the commission determined fair value was downward rather than upward. In the absence of proof that the prices paid for the construction of the bridge were abnormally low, there was no reason why in the short period of six years after its completion there should be a radical increase in fair value for rate-making purposes.¹³

What has been said and done in certain cases where cost of reproduction figured prominently in determining value may be noted. In one case where the court evidently gave consideration to the prudent investment, the court took as the basis of fair value an estimated cost of reproduction based not on prices as of the time of the rate hearing, but on prices estimated on a new plateau of costs.¹⁴ In a later case, the contention was that valuing the physical property of a utility, the rate-making body must take the reproduction cost at the time of the inquiry less depreciation. The court replied that there was no rule requiring "slavish adherence to cost of reproduction less depreciation."¹⁵ In *Los Angeles Gas & Electric Corp. v. R. R. Commission of California*,¹⁶ the court remarked that it had refused, in valuing utility property, to be bound by any artificial rule or formula which changed conditions might upset. In estimating the fair value of a plant, the court said, actual cost is a relevant fact as is cost of reproduction.

Not to give consideration to present or reproduction cost in estimating the value of a carrier's property where a commission was required by act of Congress to give consideration to all elements of value recognized by the law of the land for rate-making purposes is error.¹⁷ The court, however, did say that there were some, perhaps many, railroads the ultimate value of which should be placed far below the sum necessary for reproduction, thus indicating the fallacy of relying solely upon the cost of reproduction theory alone.

The cost of reproduction has been used to determine fair value of property in a number of cases¹⁸ and has been applied in valuing structures of a utility whose land was taken at market value.¹⁹ Real

¹³Clark's Ferry Bridge Co. v. P. S. C., 291 U. S. 227 (1934).

¹⁴Galveston Electric Co. v. Galveston, 258 U. S. 388 (1922).

¹⁵Georgia Railway & Power Co. v. R. R. Commission of Georgia, 262 U. S. 625 (1922).

¹⁶289 U. S. 287 (1933).

¹⁷St. Louis & O'Fallon Railway v. United States, *supra*, note 11.

¹⁸Ohio Utilities Co. v. Public Utilities Commission, 267 U. S. 359 (1925); United Fuel Gas Co. v. R. R. Com. of Kentucky, 278 U. S. 300 (1929).

¹⁹Denver v. Denver Union Water Co., 246 U. S. 178 (1917).

estate holdings, if not owned in fee, may be taken at their book value.²⁰ When value is determined by estimating the cost of reproduction, a sum which represents depreciation should be deducted from that cost. In the *Knoxville Water Company case*,²¹ the supreme court said:

"The cost of reproduction is one way of ascertaining the value of a plant like that of a water company, but that test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use."

When the price level has risen since the property to be valued has been constructed, a method of valuation which does not give recognition to enhanced prices is fallacious. If a plant was erected in 1900 and valued in 1920 and pre-war prices were one-half as high as 1920 prices, valuation of the plant on the basis of original cost would be erroneous.²² The average of prices used in figuring the cost of reproduction should include prices as they exist at the time of the investigation.²³

PROPERTY TO BE VALUED

Many cases mention and discuss items of property which are subjects of valuation. Land is an item to be included, and structure, of course, are valued and this value considered as an item in reaching value. These are the tangible elements to be valued. Whether "going concern value" should be considered in determining the base for rate-making depends upon the financial history of the company involved, it was said in *Houston v. Southwestern Bell Telephone Co.*,²⁴ but many cases have been reported in which going concern value was allowed.²⁵ It may be, often, a certain percentage of the value of the physical elements on a cost of reproduction basis. An Ohio commission, in one case, rejected an item of "preliminary organization expense" as an item of value on the ground that there was no proof of actual expenditure.²⁶ The court said:

²⁰*Dayton Power & Light Co. v. P. U. C. of Ohio*, 292 U. S. 290 (1934).
²¹12 U. S. 1 (1909).

²²*Bluefield Waterworks Co. v. P. S. C.*, 262 U. S. 679 (1923).

²³*McCardle v. Indianapolis Water Co.*, 272 U. S. 400 (1926). Reproduction cost of plant and business may be estimated on price levels prevailing at date of valuation or on average price levels prevailing during periods of five to ten years preceding the valuation.

²⁴259 U. S. 318 (1922).

²⁵*Denver v. Denver Union Water Co.*, *supra*, note 19. *Los Angeles Gas & Electric Corp. v. R. R. Commission*, 289 U. S. 287 (1933). "Going value is not something to be read into every balance sheet as a perfunctory addition." Justice Cardozo in *Dayton Power & Light Co. v. Commission*, *supra*, note 2.

²⁶*Ohio Utilities Co. v. Commission*, 267 U. S. 359 (1925).

"Reproduction value, however, is not a matter of outlay, but of estimate, and should include a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility."

Materials, supplies, and cash working capital are other items to be valued.²⁷ Cost of technical advice and superintendence, insurance and taxes, and a reasonable allowance for contingencies may be allowable as "overheads" and constitute items making up reproduction cost. Overheads may comprise a certain percentage of the direct cost of construction, that is, labor and materials.²⁸ Brokerage fees have been disallowed as items of value, although it was supposed that they ought be allowed, since "bankers customarily get, in some form, compensation equal to four per cent on the money procured by them."²⁹ A utility has not been allowed to claim a special value for its property based upon the fact that its property is favorably located so as to utilize natural advantages.³⁰ The court denying this claim said:

"In the determination of the value of its property, appellant was entitled to be allowed the fair market value of its real estate for all its available uses and purposes, which would include any element of value that it might have by reason of special adaptation to particular uses. But it was not entitled to an increase over this fair market value by virtue of the public use."

"Good will" as distinguished from "going concern value" is not an element to be considered.³¹ The value of the company's franchise may or may not be an item of the base. It was allowed in *Willcox v. Consolidated Gas Co.*,³² where seven gaslight companies in New York City having consolidated, the value of the franchise of all companies was fixed. The franchise value was later increased in value in the proportion that tangible assets had increased in twenty-three years. This was an exceptional case, for subsequently it was said that a gas company's franchise to do business not being a

²⁷*McCardle v. Indianapolis Water Co.*, *supra*, note 23.

²⁸*Dayton Power & Light Co. v. P. U. C. of Ohio*, 292 U. S. 290 (1934); *Los Angeles Gas & Electric Corp. v. R. R. Commission*, 289 U. S. 287 (1933).

²⁹*Galveston Electric Co. v. Galveston*, 258 U. S. 388 (1922). Cost of financing a plant cannot be an item in the rate base if there was not evidence that such cost was incurred or would be incurred in the event of reconstruction. *Wabash Valley Electric Co. v. Young*, 287 U. S. 488 (1933).

³⁰*Clark's Ferry Bridge Co. v. P. S. C.*, 291 U. S. 227 (1934).

³¹*Willcox v. Consolidated Gas Co.*, 212 U. S. 19 (1908).

³²*Ibid.*

monopoly, the value of the franchise was not to be included in fixing the rate.³³

The fact that a utility may reach financial success only in time does not make past losses an element to be considered in determining the rate base.³⁴ Past losses obviously do not tend to prove present value. Organization or "pre-construction" costs may constitute an item to be used in estimating the rate base, although in a recent case the court refused to allow such costs where it did not appear from evidence that they were actually incurred and where it was conjectural at best whether they would have been incurred in the hypothetical reproduction of the business.³⁵ Interest charges or return unearned during the business development period has been denied under certain circumstances as an allowable item of going value.³⁶

OPERATING EXPENSES AND RATE OF RETURN

In ascertaining the proper return due a utility company, cost of operating the plant must be deducted from the annual gross income. Charges to operating expenses "may be as important as valuations of property," the court has said, pointing out that "excessive charges of \$1,500,000 to operating expenses would be the equivalent of six per cent on \$25,000,000 in a rate case."³⁷ Charges for annual depreciation and for maintenance are allowable operating expenses, and the combined amounts may be ascertained by taking a certain percentage of the value or the assumed cost of the depreciable part of the system.³⁸ Interest due on outstanding obligations may be allowed as an operating expense.³⁹ Money paid to federal or state governments as taxes is an expense of operating a company.⁴⁰ Of depreciation, the court has said:

"Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. . . . In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the

³³Georgia Railway & Power Co. v. R. R. Com. of Georgia, *supra*, note 15.

³⁴Galveston Electric Co. v. Galveston, *supra*, note 14.

³⁵Dayton Power & Light Co. v. P. U. C. of Ohio, 292 U. S. 290 (1934).

³⁶Columbus Gas & Fuel Co. v. P. U. C. of Ohio, 292 U. S. 396 (1934).

³⁷Lindheimer v. Illinois Bell Tel. Co., 292 U. S. 151 (1933).

³⁸Galveston Elec. Co. v. Galveston, *supra*, note 29; United Rys. & Electric Co. v. West, 280 U. S. 234 (1930).

³⁹Banton v. Belt Line Ry. Corp., 268 U. S. 413 (1925).

⁴⁰Galveston Elec. Co. v. Galveston, *supra*, note 29.

cost of producing the service, an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered."⁴¹

The rate of depreciation allowance is a question of fact and a depreciation rate of two per cent has been approved by the court.⁴² Where a company owns wasting assets, say gas-producing lands or leaseholds, a sum to amortize the value of leaseholds, well structures and equipment in connection therewith is a proper operating expense.⁴³

A public utility is entitled to such rates as will permit it a return equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings attended by corresponding risks and uncertainties, but the return should not be equal to that in highly profitable enterprises.⁴⁴ The court has said that it could not approve a finding "that no rate yielding as much as six per cent upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the master, that eight per cent was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other businesses in the vicinity; seven per cent being the 'legal rate' of interest. . . ."⁴⁵ Where gas lands and leases were the subject of valuation, a return of fourteen per cent, which included over four per cent for amortization and depreciation of one and one-half per cent, was held liberal.⁴⁶ But a rate of 4.53

⁴¹Lindheimer v. Illinois Bell Tel. Co., *supra*, note 37. "While it is true that the annual depreciation charge does not purport to measure the current actual consumption of plant, it may be that the credit balance in the depreciation reserve is good evidence of the amount of accrued depreciation." *United Rys. & Elec. Co. v. West*, *supra*, note 38 (dissent.)

⁴²*Georgia Ry. & Power Co. v. R. R. Com. of Georgia*, 262 U. S. 625 (1923). Four per cent depreciation annuity was allowed in *Galveston Elec. Co. v. Galveston*, 258 U. S. 388 (1922).

⁴³*Dayton Power & Light Co. v. P. U. C. of Ohio*, 292 U. S. 290 (1934). "To withhold from a public utility the privilege of including a depletion allowance among its operating expenses, while confining it to a return of 6½% upon the value of its wasting assets, is to take its property away from it without due process of law at least where the waste is inevitable and rapid." *Columbus Gas Co. v. P. U. C. of Ohio*, 292 U. S. 398 (1934).

⁴⁴*Bluefield Waterworks Co. v. P. S. C.*, 262 U. S. 679 (1923). An electric utility company will not be allowed a rate of return which in addition to providing for bonds, debt discounts, borrowed money and stock dividends, is to accumulate a surplus and make it easier to finance the company. *Wabash Valley Electric Co. v. Young*, 287 U. S. 488 (1933).

⁴⁵"Complainant had not such a monopoly nor were its profits 'virtually guaranteed' in such a sense as to permit the public authorities to restrict it to a return of 6 per cent upon its invested capital." *Lincoln Gas & Elec. Light Co. v. Lincoln*, 250 U. S. 256 (1919).

⁴⁶*United Fuel Gas Co. v. R. R. Com. of Kentucky*, 278 U. S. 300 (1929).

per cent is too low a rate to satisfy the requirements of the Constitution when applied to a corporation engaged in the sale of gas during the years 1928 to 1931, two at least of the four years being before the days of the depression.⁴⁷

Recent cases before the supreme court illustrate new methods of ascertaining value of utility properties and consider hitherto undiscussed items of operating expenses, but the court does not depart from the rule which requires consideration of certain relevant facts in arriving at fair value. In *West v. Chesapeake & Potomac Telephone Co.*,⁴⁸ the court remarked that in finding value the substitution for such factors as historical cost and reproduction cost a "translator" of dollar value obtained by the use of price trend indices served only to increase the difficulty of rate valuation. In *West Ohio Gas Co. v. P. U. C.*,⁴⁹ operating expenses, rather than valuation, were in issue. In a companion case,⁵⁰ the court held that it was error to adopt one year out of four as an exclusive test in determining whether new rates were adequate. There is no dissent from the proposition that the fair value of utility property is the basis of all calculations as to the reasonableness of rates to be charged by utility companies. Dissent arises, however, because members of the court have felt that the rule used to determine fair value is shifting, inexact, and dependent to a large extent on expert testimony as distinguished from fact. The task it imposes on courts of determining fair value, in the words of a dissenting justice, projects them into the most "speculative" undertaking in the entire history of English jurisprudence.⁵¹

⁴⁷*West Ohio Gas Co. v. P. U. C.*, 55 S. Ct. 316 (1935). For view that $4\frac{1}{2}$ per cent is an adequate return, see dissent in *West v. Chesapeake & Potomac Tel. Co.*, 295 U. S. 662 (1935).

⁴⁸295 U. S. 662 (1935).

⁴⁹294 U. S. 63 (1935).

⁵⁰*West Ohio Gas Co. v. P. U. C.*, No. 2, 294 U. S. 79 (1935).

⁵¹*West v. Chesapeake & Potomac Tel. Co.*, *supra*, note 48, Stone dissenting.

INSURER'S LIABILITY AND RIGHTS WHEN INSURED'S DEATH IS CAUSED BY BENEFICIARY OR ASSIGNEE

HUBERT S. LIPSCOMB*

The subject of this article is suggested by a decision of the Supreme Court of Mississippi handed down on April 13, 1936, *Penn Mutual Life Insurance Company v. Nunnery*.¹

Although there are many decisions from many jurisdictions dealing with the question as to the liability and rights of the insurer when the death of the insured is caused by the beneficiary or by an assignee, it seems that in the Nunnery case the Supreme Court of Mississippi has dealt with this question for the first time. The policy involved contained a Double Indemnity clause providing as follows:

"The Penn Mutual Life Insurance Company of Philadelphia agrees to pay One Thousand Dollars, in addition to and together with the face amount of this Policy, upon receipt of due proof that the death of the insured resulted solely from bodily injuries effected directly and exclusively by external, violent and accidental means, and that such death occurred within ninety days after sustaining such injuries.

"This Double Indemnity Benefit shall not be payable if the death of the insured resulted directly or indirectly . . . from committing a felony. . . ."

As stated by the Court:

"The grounds of the appellant's claim that no liability arises under this clause of the policy are: (1) The insured's death was not accidental within the meaning of the policy, for the reason that (a) it resulted from the commission by him of a felony, and (b) was provoked by a deadly assault made by him on the appellee; (2) if not so provoked, the appellee murdered the insured, and therefore cannot recover."

The Supreme Court announced the general rule that if the beneficiary murdered the insured she could not recover the proceeds of the policy. At first blush, it would appear that this ruling settles the matter in Mississippi and that hereafter insurers would know

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1167 So. (Miss. 1936) 416.

what their rights and liabilities are in a case where the beneficiary murders the insured, but such is not the case, as we shall hereinafter attempt to point out. Many elements enter into the picture, and the question has many angles and ramifications that the decision sheds no light on, for the simple reason that the Court very correctly decided only what it was necessary to decide in order to properly dispose of the case. Recovery under the Double Indemnity clause of the policy was denied to appellee because she was hooked on one or the other horn of the following dilemma: If she killed insured in necessary self-defense it followed that the insured must have been making an unprovoked deadly attack upon her and, therefore, his death was not "accidental"; on the other hand, if the beneficiary did not kill the insured in self-defense, then she was guilty of his murder and, therefore, could not recover the proceeds of his policy.

Section 1413 of the Mississippi Code of 1930, provides:

"If any person wilfully cause or procure the death of another in any way, he shall not inherit the property, real or personal, of such other; but the same shall descend as if the person so causing or procuring the death had never been in being."

Section 3566 of the same Code provides that if any person wilfully cause or procure the death of another he shall not take the property of such other under a will and the devolution of such property shall be the same as if the party making the will had died intestate. It will be observed that the scope of these statutes is limited to descent and distribution, and the execution of wills. Mississippi, unlike many states, has no statute specifically dealing with the disposition of the proceeds of an insurance policy in a case where the beneficiary murders the insured. As we shall attempt to point out hereinafter, this makes a difference. We take it that the fountain source of all such statutes, as well as the case law, denying recovery to a beneficiary who murders the insured, is the ancient and honored common law maxim that no one shall be permitted to profit by his own wrong, sometimes expressed in the Latin form: *Nullus commodum capere potest de injuria sua propria*.

When *McAllister v. Fair*² was decided, the statute in Kansas providing that a husband should succeed to the property of his deceased wife contained no exception in the case of the murder of the wife by the husband. In that case it was shown that the husband

²72 Kan. 533, 84 Pac. 112, 3 L. R. A. (N. S.) 726.

killed his wife for the purpose of succeeding to her property, was convicted of murder, and assigned his interest in his wife's estate to the attorney who defended him in the murder trial. The attorney, claiming through assignment from the convicted murderer, was held to be entitled to the property as against deceased's collateral heirs. The court conceded that the result was "abhorrent to the minds of right-thinking people," but, with respect to the statute of descent and distribution said:

"The argument that a literal interpretation of the statute would, in effect, encourage crime and contravene public policy is no reason why the court should disregard a plain statutory provision, nor justify it in determining the policy of the state upon the question. The right to determine what is the best policy for the people is in the legislature, and courts cannot assume that they have a wisdom superior to that of the legislature, and proceed to inject into a statute a clause which, in their opinion, would be more in consonance with good morals or accomplish better justice than the rule declared by the legislature."

A distinction was made, however, between that case, where the right to the wife's estate was conferred by statute, and cases involving insurance policies and the like, on the ground that the Court's conception of public policy would prevail over a private agreement but not over positive legislation.

The first case denying recovery to a beneficiary, or those claiming through him, on the ground that he had taken insured's life in *Schmidt v. Northern Life Association*.³ The main criticisms of this rule have been: First, it imposes on the slayer a penalty for crime not authorized by the criminal law; second, it is contrary to constitutional provisions or statutes forbidding corruption of blood and forfeiture of estates. On the contrary, it has been held that the enforcement of the rule that no one may profit by his own wrong does not in reality deprive the criminal of property as a punishment.⁴

It would seem that if the arguments against the rule that a murderer cannot inherit the estate of his victim are sound, there is no reason why they should not apply generally to cases where the criminal claims under an insurance policy. However, while the Mississippi statute of descent and distribution is unambiguous, the

³112 Iowa 41, 83 N. W. 800, 51 L. R. A. 141.

⁴*Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340; *Lanier v. Box*, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458; *Terry v. Strawbridge*, 209 Mo. 621, 108 S. W. 641, 16 L. R. A. (N. S.) 244.

statutes providing that a criminal cannot inherit from his victim and cannot take under the will of his victim, are equally unambiguous. The Supreme Court in the Nunnery case indicated that these statutes reflected the public policy of Mississippi and applied the maxim, upon which the statutes were founded, to an insurance case, governing which there is no statute.

The first question that ordinarily presents itself is, under what circumstances as to the *nature* of the homicide can the rule, that a beneficiary who murders the insured is precluded from receiving the policy proceeds, be successfully invoked. In many jurisdictions, there are several degrees and shades of both murder and manslaughter. In Mississippi, an unjustifiable homicide is either murder or manslaughter outright, without any qualifying degrees. Cases outside of Mississippi wherein it was proved that the beneficiary murdered the insured for the *specific purpose* of accelerating the maturity of the policy uniformly hold that the murderer is precluded from taking the proceeds. As to whether or not the existence of such an intent is essential to bar the beneficiary, most of the cases are silent except for some dissenting and especially concurring decisions and dictum. While this phase of the question presents a very interesting field, and quite a few *analogous* cases are available, for the sake of brevity, we shall pass it up by indicating that the Supreme Court of Mississippi appears to have definitely decided this particular question in the Nunnery case:

"It is true that the evidence does not disclose, and we will say negatives, any idea that the appellee killed the insured *in order to collect the policy*. But that fact is of no consequence here. This is in accord with the public policy of this state as reflected by sections 1413 and 3566, Code 1930, which prohibit one who has wilfully killed another from inheriting from him or taking property under a will by him."

It, therefore, appears that the Mississippi rule is that the killing must be intentional and wrongful, but that it is not necessary to show, in order to preclude the beneficiary, that the latter killed the insured with the intention and for the purpose of accelerating the maturity of the policy. Thus it would seem that in Mississippi a beneficiary who murdered the insured would be precluded from recovering even though such beneficiary had no knowledge whatsoever that the insured even had a policy of insurance. Another interesting case might be imagined: A is beneficiary in a policy wherein her husband, B, is the insured. A does not even know of

the existence of the policy. A takes B riding in an automobile and the latter is killed in an accident due to the culpable negligence of A in operating the car. Her negligence is of such wilful and wanton character as to justify a jury in finding her guilty of manslaughter. She had no *actual* intent whatsoever to kill her husband, but, in contemplation of law, the killing was intentional and wrongful because, on account of her disregard of her husband's safety, intention is imputed to her. Under these circumstances, it seems that in a great many jurisdictions she could receive the proceeds of the policy, but it appears that in Mississippi, under the Nunnery case, she would be barred.

Another question that is frequently presented in cases of this kind relates to the admissibility of the record of a conviction or acquittal of the beneficiary or assignee on a charge that he murdered the insured. By the great weight of authority such a record is not even admissible. By a still greater weight of authority, the record of a criminal prosecution is not *conclusive* in a civil suit. The parties to the two actions are not the same; the rules as to the competency of witnesses differ in the two classes of cases. In a criminal case the jury must believe the defendant guilty beyond a reasonable doubt, while in a civil case a preponderance of the evidence will justify a verdict; and, under the "scintilla" rule, such as obtains in Mississippi, very flimsy evidence will justify the submission of a civil case to the jury. The majority rule as to the admissibility of such evidence in an insurance case where the beneficiary was charged with the murder of the insured is laid down in *Lillie v. Modern Woodmen of America*,⁵ wherein the Court said:

"The question then arises: Was it competent as substantive evidence in this suit upon the benefit certificate to prove that plaintiff had, in fact, murdered her husband, the assured? The answer must be that it was clearly not admissible. . . . It is fundamental and elementary that in a civil suit, where the defense is that plaintiff had by a criminal act violated the provisions of the contract upon which the action is based, the record of his conviction in a criminal prosecution of such criminal act, which is pleaded as a defense, cannot be received as substantive proof of such violation."

The most important question, in this connection, apparently left open by the Supreme Court of Mississippi in the Nunnery case, is: When the beneficiary or assignee cannot take the proceeds of the

⁵89 Neb. 1, 130 N. W. 1004.

policy on account of having murdered the insured, what becomes of them? Section 1413, Mississippi Code of 1930, provides that decedent's estate shall descend as if the person causing his death had never been in being. In the case of a will, Section 3566 provides that any devise to the person causing the intestate's death shall be void; and as to the property so devised, the decedent shall be deemed to have died intestate. It would be safe to assume that in an insurance case the Supreme Court of Mississippi would hold, in keeping with the principle of these statutes, that the proceeds of the policy would go to those who would receive them, had the beneficiary who murdered the insured not been in being. However, this would not necessarily follow in all cases.

Let us assume a case where a beneficiary wife murders her insured husband. They have no children. Under the rule, she cannot take the proceeds of the policy. There are no creditors and, if there are, the proceeds of the policy are exempt; there are no living collateral heirs; the insured dies intestate. Would the Court say that insured's administrator would be entitled to the proceeds of the policy? Under our statute of descent and distribution, the wife would be the sole heir at law of her husband. Ordinarily, it would be the duty of the administrator to distribute the money in his hands to the wife. In this way, the wife would get *indirectly* what the law forbids her to get *directly*. But under Section 1413, Mississippi Code of 1930, the administrator could not pay this money to the wife. Under those circumstances, would the Court permit the insurer to retain the proceeds of the policy? Of course, the case assumed would be a rare one, as, ordinarily, the intestate would have some collateral heirs entitled to inherit from him in event of his wife's incapacity to receive his estate.

Some cases from jurisdictions having no statute similar to said Section 1413 are interesting.

In a leading English case, *Cleaver v. Mutual Reserve Fund Life Association*,⁶ the Court said:

"That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy. But this doctrine ought not to be stretched beyond what is necessary for the protection of the public; and, if the matter can be dealt with so that such person should not be benefitted, I do not see any reason why the defendants

⁶¹ Q. B. 147.

in such a case should be allowed to say, though they might have received premiums perhaps for thirty years and still retained the same, that public policy forbade their paying the sum of money which they had contracted to pay."

The courts are in general agreement that the fact that the beneficiary is prevented from recovery, by virtue of having murdered the insured, bars only the wrong-doer and those claiming through him, and does not justify the insurer in retaining the fund it has contracted to pay upon the death of insured, except, of course, where the contract expressly makes death caused by the beneficiary an excepted risk. But the insurer has been allowed to retain the proceeds of the policy on the life of one killed by the beneficiary where the policy is fraudulent in its inception and, therefore, void *ab initio*, as, for instance, where the policy was taken out by the beneficiary with the intention of taking insured's life.⁷ It also seems that the insured may retain the proceeds where there is no one other than the wrong-doer, or those claiming through him, who has any interest whatsoever in the policy.⁸

In *Johnston, Admr., etc. v. Metropolitan Life Insurance Company*,⁹ defendant issued a Twenty Year Endowment policy on one Pickens with the latter's wife as beneficiary. Some years later insured was murdered by his wife, who was convicted of the crime and sentenced to the penitentiary for life. Shortly after commission of the murder she assigned all of her right under the policy to Daugherty and Shields. Pickens left no children and owed no debts. Insurer declined to pay the proceeds of the policy either to the beneficiary or to her assignees or to the administrator of the estate of Pickens, and the administrator brought suit. The Court said:

"That Susie Pickens, the beneficiary, has no right to recover upon this policy of insurance, can scarcely be doubted. The liability of the company became fixed by the death of the insured, and this was brought about by the felonious act of the beneficiary. It would be monstrous for the courts to lend their aid to anyone for the purpose of enriching himself by the commission of murder, and to entertain suit on behalf of the beneficiary to recover upon this policy of insurance would be doing that very thing. It is against the policy of our law to reward one for the commission of crime, and whenever the effect of the enforcement of a right which one

⁷Goldstein v. New York Life Insurance Co., 234 N. Y. S. 250.

⁸See New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591; Spicer v. New York Life Ins. Co., 268 Fed. 500.

⁹85 W. Va. 70, 100 S. E. 865, 7 A. L. R. 823.

would otherwise have would be to give him an advantage by reason of his felonious act, the courts will decline to entertain it. . . . Nor can the assignees of the beneficiary stand on any higher ground than the beneficiary herself. At the time she made the assignment to them she had nothing to transfer. She had voluntarily placed herself in a status which disqualified her to be beneficiary under the policy. Consequently, the assignment to Daugherty and Shields was ineffectual to transfer any interest in the fund.

"This denial of the right of the beneficiary or her assignees to recover under such circumstances is not, however, based upon lack of liability of the insurer to pay. The policy of insurance is not avoided for such cause by its express terms, and there is no reason why such an exception should be read into it when the interest of other parties is affected. This doctrine of public policy will not be carried by the courts any further than is necessary to prevent resort to them for the purpose of effecting a fraudulent purpose. It is not for the purpose of relieving the insurance company from liability, and if there is any person without fault who has a right to the benefit of the policy the same will be enforced. In other words, there is no condition in the policy avoiding it in case of the murder of the insured, and the liability of the company is just the same where death is the result of murder as where it is produced by any other cause. The only difference is that in case the murderer is the beneficiary named in the policy he is denied recovery, not because the company is not liable, but because he has placed himself in such a position that he cannot invoke the aid of the courts. But does the fact that the beneficiary named in the policy cannot recover discharge the company from liability in all cases? It is very generally held that, where the specific beneficiary named in a policy of life insurance dies, the policy of insurance nevertheless remains in force, and recovery may be had thereon by the personal representatives of the insured upon his death for the benefit of his estate. What is the effect when the beneficiary, by some act of his, puts himself in a position where he cannot invoke the aid of the courts to enforce his right to claim the money to which he would otherwise be entitled? The rule of public policy, as before stated, will not be extended further than is necessary to prevent a felon from reaping benefit from his crime, and it may be said that when by this rule the murderer, who is the beneficiary, is deprived of his right to recover, the doctrine is extended as far as is warranted. This would leave in the hands of the insurer a fund or estate created by the insured. The insurance company is

not entitled to it, and the party that the insured desired to have it cannot take it. He forfeited his right to it. What, then, is the result? Naturally, it becomes the property of the estate of the insured, very much in the same way as an estate which is left by will to a particular devisee or legatee passes by Laws of Descents and Distributions upon the failure of such legatee, and it has been held that, where a legatee in a will murders the testator, the legacy provided for him in the will will pass to the heirs of the testator under the Statutes of Descent and Distribution. *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188. And it is likewise very uniformly held, and it occurs to us upon sound reason, that, where the beneficiary in a policy of life insurance is denied the right of recovery upon grounds of public policy, a trust results in favor of the estate of the insured, and ordinarily the personal representative of the insured can maintain a suit to recover the funds for the benefit of that estate. . . .

"In this case, however, the defendant insists that the personal representative should not be allowed to recover, for the reason that such recovery would be for the benefit of the murderess. The insured had no children, and his widow, under the Law of Descents and Distributions, is the sole distributee of his personal estate. The fact that the courts will not, on grounds of public policy, permit her to bring suit to recover this fund, does not bar her from taking the estate of her deceased husband. Under our law there is no longer corruption of blood or forfeiture of estates upon conviction of crime, and there is no exception in our Statutes of Descent and Distribution precluding one from inheriting in a case like this. The laws governing the devolution of property are an expression of the public policy of the state, contained in its Constitution and legislative acts, and the courts are not justified in attaching to these acts exceptions or limitations which have not been placed thereon by the lawmaking bodies. It therefore follows that if the personal representative of the insured in this case is permitted to recover this fund, the beneficiary will accomplish by indirection that which she could not do directly. That the property of one who has been murdered will devolve upon the murderer, where such is the course of distribution provided by law, seems to be well settled in most of the American states. . . .

"Will the courts, then, allow themselves to be used for the purpose of bringing into existence an estate which will, by operation of law, devolve on one who, because of his conduct, is not entitled to it? The administrator has no interest in the subject-matter. It is agreed here that the insured left no

debts, and it follows that every dollar of the fund recovered by the administrator in his representative capacity must go to the murderess. The suit is simply in his name for the benefit of the one who feloniously caused the insured's death. . . .

"In some of the cases we have above cited, permitting a recovery by the administrator of the insured where the beneficiary had caused the death, it was suggested that part of the fund might go to the beneficiary under the Law of Descents and Distributions, but that was held not to defeat recovery. That may be true where only part of the fund goes to the guilty party. It may be that the courts would not allow the innocent to be deprived of the property to which they are entitled, for the sole reason that to enforce their rights would also confer a benefit upon a guilty party. However, that question does not arise here, and we express no opinion thereon. We are of opinion, however, that where the guilty party would take the whole of the recovery in case one is allowed, the policy of our law as effectually denies recovery as it would were the suit brought in the name of the guilty party himself.

"It follows from what we have said that the judgment of the Circuit Court will be reversed, and the judgment of the Court of Common Pleas affirmed."

The Court of Common Pleas had found for the defendant company, and thus it appears that the insurer was enabled to retain the estate which the insured had built up through the payment of premiums, for the simple reason that a consideration of public policy prevented anyone from being in position to collect the proceeds of the policy, either directly or indirectly.

In *Lee v. Southern Life and Health Insurance Co.*,¹⁰ the policy provided that it should be "incontestable after one year from date of issue, except for fraud or misstatement of age." The contestable period had run at the time the beneficiary was alleged to have murdered the insured. The Court held that on account of such incontestable clause it was no defense to the action on the policy that the beneficiary murdered the insured. The Court indicated, however, that the incontestable clause would not preclude the defense of the killing of the insured by the beneficiary where that was made an excepted risk by the express terms of the contract. Where, however, it was merely an implied exception imposed by common law principles of public policy, as set forth in the maxim hereinabove referred to, the incontestable clause would destroy this defense. The court distinguished *New York Mutual Life Insurance Company v.*

¹⁰98 So. (Ala. 1923) 696.

Armstrong, supra, on the ground that the policy involved in that case contained no incontestable clause. It seems to us that what the court held in the Lee case is tantamount, logically, to holding that the defense that the beneficiary murdered the insured would never serve to defeat the beneficiary's action on the policy, regardless of whether it contained an incontestable clause or not. If public policy requires that a beneficiary who murders the insured be denied the fruits of her crime, then, where that particular defense is invoked, why would the court not say that such clause, insofar as it would operate to enable the beneficiary to recover, is void as being in contravention of public policy? Suppose, for instance, an insurer should issue a policy expressly providing that the proceeds be paid to the beneficiary in the event she murdered the insured more than one year after the issuance of the policy. Any court would undoubtedly hold this contract void as being contrary to public policy. Yet, why should the court in the Lee case have construed the incontestable clause in such a way as to bring about a result which it would be illegal to stipulate for expressly?

However, the Supreme Court of Alabama, in the recent case of *Henderson v. First National Bank of Birmingham*,¹¹ said:

"It is charged in the last amendment to the bill that Bell was intentionally responsible for, or feloniously procured, the death of Henderson. If such was the established fact, there could be no recovery by such wrongdoer or by his privy in estate, unless the case falls within the operation of an incontestable clause. *Lee v. Southern Life & Health Ins. Co.*, 19 Ala. App. 535, 98 So. 696; 37 C. J. 575, Par. 341."

The opinion in the Nunnery case, supra, is silent as to whether the policy contained an incontestable clause. We assume, however, that the policy either did not contain an incontestable clause or else the contestable period had not expired, else the plaintiff would undoubtedly have invoked the clause in order to obviate the effect of the testimony as to false answers in the application. It is safe to assume that the contestable period had not run, as practically all policies now contain some form of incontestable clause. From the spirit of the opinion, though not from the letter, our best guess is that, had the Court been confronted with the specific question, it would have held that the incontestable clause could not serve to defeat the ends of public policy by precluding the defense that the beneficiary murdered the insured.

¹¹159 So. (Ala. 1935) 212.

From the foregoing observations, it appears that the problem of disposing of the policy proceeds, when the beneficiary or assignee is accused or suspected of murdering the insured, is not free of difficulties, even though, in Mississippi, the problem has been disposed of to some extent in the Nunnery case. If the beneficiary has forfeited his right to the proceeds by murdering the insured, it is not a forfeiture which the insurer can waive and go ahead and pay the proceeds to the beneficiary anyway, as there is usually an alternative claimant who has a right to such proceeds when the beneficiary has not. Therefore, in order to protect itself against possible double liability, the only safe course that may be followed by the insurer, when the beneficiary is even suspected of murdering the insured, is to file a bill of interpleader, pay the proceeds of the policy into court and bring in, as defendants to the bill, every party who could possibly have any interest whatsoever in the proceeds of the policy.

The question as to who such parties should be is not altogether free from difficulty itself. For instance, in *Equitable Life Assurance Society v. Hartfield, et al.*,¹² our court held that the heirs at law of the insured could maintain a direct action on a policy taken out by the deceased for his own benefit as against the Company's contention that the action should have been brought by an administrator; that if there were other policies which, together with the one sued on, aggregated more than the amount of the exemption, that was a matter of defense which it was incumbent upon the insurer to show. Subsequently, and evidently to obviate the effect of that decision in imposing upon the insurer the burden of determining whether its deceased policyholder either left any debts or held policies aggregating more than the amount of the statutory exemption, the Legislature enacted Section 1758 of the Mississippi Code of 1930, providing that:

"The proceeds of all unassigned life insurance policies payable to the executor or administrator of the insured, upon the death of the insured, shall, whether exempt or not, be paid by such insurance company, to the executor or administrator of such insured deceased, and the receipt of such executor or administrator shall constitute a full and complete acquittance to such insurance company as against the claims of any and all persons claiming any rights under such policy of insurance."

In respect to whether the words, "payable to the executor or administrator," would apply alone to a case where the proceeds would

¹²87 Miss. 548, 40 So. 21 (1906).

be made *expressly* so payable by the policy itself, or whether they would also apply where the proceeds are payable to the executor or administrator *by operation of law*, the Supreme Court has never construed the statute. The writer recently had that question before the Supreme Court of Mississippi in a case where the heirs at law of the deceased policyholder were suing the company for total and permanent disability benefits alleged to have accrued to the insured himself during his lifetime, in which policy the beneficiary designated to receive the death benefits was not an heir of the deceased. The Supreme Court evidently considered it unnecessary, under the facts and circumstances obtaining in that case, to decide that question, as the case was disposed of without reference thereto in the opinion. It seems to us, however, that the necessary legal effect of the decision in *Chattanooga Sewer Pipe Works v. Dumlér*,¹³ taken in connection with Chapter 138 of the Laws of 1932, exempting income from disability insurance, was to make it possible for the heirs to maintain such a suit.

If a policy is payable to a designated beneficiary, who murders the insured and thus precludes recovery on her own account, do the proceeds thereof become "payable to the executor or administrator" by operation of law? If so, it would seem the insurer need interplead nobody but the beneficiary and personal representative of the deceased. But the insurer should give due consideration to the statutes, exempting the proceeds of a policy payable to a designated beneficiary, and a policy payable to the executor or administrator, and the decisions construing them, in determining whether or not to make the heirs of the deceased policyholder parties to the bill of interpleader. If they are proper parties, it may sometimes be desirable to interplead them, even though they may not be considered as necessary parties. For instance, if both the personal representative and the beneficiary reside in the same state the bill would have to be filed in the State Court. If for any reason the insurer desires to file the bill in a Federal Court, and the heirs at law live in another state, and the heirs properly claim the proceeds of the policy, then insurer may proceed under the Act of Congress of the United States of January 20, 1936.¹⁴ The availability to the insurer, in a case of this kind, of the Federal Declaratory Judgment Act¹⁵ presents to the insurer a possible alternative to the bill of interpleader, but any discussion thereof here will unduly prolong this article.

¹³120 So. 450.

¹⁴28 U. S. C. A. § 41, Sub. § 26.

¹⁵28 U. S. C. A. § 400.

STATE BAR SECTION

THE PROPOSED AMENDMENT TO CHANGE THE MANNER OF SELECTING JUDGES

R. J. FARLEY*

There have existed in the United States in varying degrees of popularity two principal methods for the selection of judges: appointment by the governor and election by the people. Mississippi has experimented with both and seems to have found neither to its satisfaction. The advantages and disadvantages of each are so well known as to render useless an enumeration in detail. But with a view to a combination of the better features of each, the Honorable Frank Everett at the last meeting of the State Bar Association, as Chairman of the Committee on Manner of Selection of Judges, submitted a report in which a plan was promulgated whereby a supreme court judge would be appointed by the governor from a list of not more than five nor less than three names submitted after balloting by the State Bar Association and an inferior judge from a list not to exceed three, submitted by the members of the bar in the jurisdiction affected. It was conceded that a constitutional amendment would be necessary to effectuate these changes.

No one should be so dogmatic as to contend that this plan will cure all ills, but the question should turn upon whether it will portend a sufficient improvement to warrant experimentation. Reforms are accomplished little by little ordinarily. Honorable Charles Garnett has performed a good service by putting forward in the February issue of the Journal some very poignant and effective arguments against any change after his virile and matchless manner. But it does not necessarily follow, as Mr. Garnett assumes, that there will be a gubernatorial line-up of judicial candidates even so much as presently. Isn't it true that now in practically all our elections the ordinary voter inquires, putting first things first, whether the prospective judge belongs to this or that faction and whether he ever voted with this or that crowd? The new plan at least offers a possibility of check here. An aspirant for a judgeship could ill afford

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as a matter of policy to be a strong partisan either before or after selection. Even though he were told "right" as the chancellor-candidate in Mr. Garnett's anecdote demanded, he still has the hurdle of the bar to overcome and certainly the "best politics" for the governor, pausing on his way to the Senate, ordinarily would be to appoint the man most favored by the Bar. And to whom would the selected candidate, his family and friends, owe the most gratitude—to a governor, now powerless to remove or re-appoint him, to a large number of critical lawyers with whom he must work continuously, or to the unknown next governor who will act upon the next poll of the lawyers? In such a spreaded division of affection and gratitude should lie the necessity of fair dealing with all in the emboldened knowledge of the thorough impossibility of personally pleasing each.

Practically the whole of Mr. Garnett's argument is built on the basic assumption that "this is no more than the old appointive system we used to have, looking a bit more coquettish, and with a little more embroidery on its pantalettes." But the proponents of the new plan would carry the figure a bit farther and say that even though the Colonel's lady and Judy O'Grady are sisters under the skin yet the separated fulfillment of their destinies usually is explainable in no other terms than the pleasing coquetry and embroidered pantalettes of the one and the lack of the other! Conceding all the vices of the old appointive system, are the coquetry and embroideries of the new sufficient to off-set the draw-backs? The judgment is institutional and conventional, not soul-searching. After all, the Colonel did not marry Judy O'Grady! The notion has been built up, primarily by the lawyers and whether it be fallacious or not is immaterial to the present point, that the last refuge of freedom, right, and impartial justice, lies in the court as an institution. Every lawyer knows that the judges are human in varying degrees after a manner of speaking, but every lawyer also realizes that in the imagined merger of a judge into a representation of the impassive and inscrutable sovereign, distinct from his own private being, is a valuable emotional ideal which acts upon the judge himself and reacts upon the people, building up on itself toward the accomplishment of an ethical goal, even though it will never be reached generally. Yet it is *good* so long as it acts and reacts. It is this which converts any workaday human effort into an institution. Shake the faith of either the personifiers or the upholders of the ideal and a tremendous intangible goodness is

lost which should demand either abandonment or replacement lest it become an instrument of evil. Conceding for the time being every contention made by Mr. Garnett, we still have possible the preservation of some institutional values, which, it is feared, are being fast dissipated under the present regime through no fault of the men who innocently may happen to hold the offices. The humiliation of the hand-shaking candidate for judge is as nothing compared to the concomitant familiarity which breeds contempt in the mind of the voter toward the institution of the judiciary. Added are the pain and embarrassment, not to mention the temptation that is sometimes apparent, on the personification of the court—the judge, in the trial of a case. There are potential political influences pressing tacitly upon the elected judge in every lawsuit. Which party to the suit controls the most votes? Whether they motivate the judge consciously or unconsciously or affect his rulings not at all, the destructive influences are there nevertheless for cogitation by the voters and for political construction to be placed thereupon. There is a definite loss to the esteem of the court as an institution however wrong and erroneous it may be. Who has not heard the whispers after nearly any term of court? But with a judge who owes his appointment to a selection by members of the Bar, what basis can there be for impugning his integrity? The governor is seldom a litigant. There is no ground for wonderment whether this ruling or that decision pleased him. Besides he can't succeed himself to renew the appointment if and when the judge is re-nominated. As to the Bar, the young lawyer, the old lawyer, the small practitioner, the large practitioner, all have the same sized vote. To attempt to please all the lawyers would seem to be futile. The best political policy of the judge in the interest of selfishness would seem to be to deal as fairly and impartially as possible. And therein lies the secret of any lastingly successful political organization. There will be politics always in everything. But a great political institution is built when political motives are made to serve the ends of the institution. If the proposed plan will tend toward making rational and selfish the doing of fairness and impartiality, then a great work will have been accomplished. A means for many present evils will have been harnessed to pull toward a future good. Only a trial will prove its efficacy.

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NOTE AND COMMENT

MARRIAGE — DIVORCE — ANNULMENT — IMPRISONMENT IN THE PENITENTIARY AS A GROUND—

MISSISSIPPI CODE ANN. (1930) § 1414.

The third ground for divorce set out in Section 1414 of the Mississippi Code of 1930 reads as follows: "Being sentenced to the penitentiary, and not pardoned before being sent there."

This section has never been construed in a recorded Mississippi case. At first glance, it might give the impression that its meaning is so clear as not to admit of any controversy as to its construction. However, there are at least two questions which might very easily arise under this statute.

The first of these questions involves the term "the penitentiary." Does this mean the Mississippi state penitentiary solely, or does it include the penitentiaries of other states or jurisdictions. Chancellor Amis in his excellent book on the subject of divorce and separation in Mississippi makes the following statement:¹

"The language of the statute for which a divorce may be granted is for 'being sentenced to *the* penitentiary, and not pardoned before being sent there.' Clearly that does not mean *a* penitentiary, or *any* penitentiary, but only *the* penitentiary of this state. No court other than the courts of this state can sentence any person to imprisonment in the penitentiary of this state, not even a Federal Court sitting in this state. Besides the divorce law of this state is an integral part of the whole system; and while it is clear that the legislative intent was that a divorce might be granted for a conviction, sentence and incarceration in the penitentiary because of a violation of the laws of this state, it does not follow that such intent was to extend the cause for divorce to a conviction, sentence, and incarceration for the violation of the laws of another state. And it is held that unless the statute expressly so authorizes, a conviction, sentence and incarceration in a penitentiary of another state, or jurisdiction does not warrant a divorce."

It is submitted that such a construction of the statute ought to be avoided if possible. There is no infamy or disgrace connected with a sentence to the Mississippi penitentiary which is not common to most of the other state penitentiaries. Chancellor Amis himself heads the section immediately preceding the one in which the quotation is found² "Conviction of felony when a cause for a divorce," thus intimating that it is the nature of the crime and the infamy attached to it that makes the ground for divorce. A great many

¹AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI (1935) 187, § 140.

²*Id.*, § 139.

similar divorce laws of other states make the nature of the crime the determining factor.³ Schouler makes the statement⁴ that such convictions become a cause for divorce "more . . . because of the public indignity sustained by the innocent spouse in consequence, who is forced to endure the ignomy of partner to a convicted felon." Whether it be the infamy, the separation or some other factor that gives rise to the cause for divorce, it can hardly be argued that the complainant suffers more because of the imprisonment of the defendant in the Mississippi penitentiary than he or she would if such defendant were imprisoned in the penitentiary of another state, excepting the possibility that there might be more publicity involved in a sentence to the Mississippi prison.

Ruling Case Law⁵ and Corpus Juris⁶ are cited by Chancellor Amis as authority for his statement that conviction outside the state or jurisdiction does not constitute a ground for divorce. These works make a general statement to that effect, but a careful examination of the authority given by them for the statement reveals the fact that the statutes considered were materially different from our statute.

In one of these cases, *Leonard v. Leonard*,⁷ the statute specified "the state prison or in a jail or house of correction." In another, *Martin v. Martin*,⁸ the statute specified "the state prison." Such language is much more restrictive than the term "the penitentiary" used in our statute.

The only other case cited is even more clearly distinguishable. In that case⁹ the court was very reluctant to restrict the applicant of the statute to the Tennessee penitentiary, but felt impelled to do so by the language of the statute as a whole. The statute only specified "the penitentiary." However, provisions of the statute stipulating that the crime should be one "which by the laws of this state is declared to be a felony" and another provision allowing publication to be made "as in the case of non-residents" constituted the language which the court felt bound them to restrict the application of the statute.

The fact that the definite article *the* is used, rather than *a* or *any*, need not restrict the application of our statute to sentences to the Mississippi penitentiary.

Bouvier says¹⁰ that "the" does particularize the subject which it modifies. Quoting from the early Pennsylvania case of *Scharff v. Commonwealth*,¹¹ he says:

³Note, 31 L. R. A. 515.

⁴SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) 1788, § 1560.

⁵9 R. C. L. 320, § 96.

⁶19 C. J. 43, §78.

⁷151 Mass. 151, 23 N. E. 732, 21 Am. St. Rep. 437, 6 L. R. A. 632 (1890).

⁸47 N. H. 52 (1866).

⁹Klutts v. Klutts, 5 Sneed (Tenn. 1858) 423.

¹⁰2 BOUVIER, LAW DICTIONARY (8th ed. 1915) 3265.

¹¹2 Binn. (Pa. 1914) 514, 516.

"Grammatical niceties should not be resorted to without necessity. But it would be extending liberality to an unwarrantable length to confound the article 'a' and 'the.' The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object."

The case quoted from involved a verdict of the jury finding the defendant "guilty of writing and publishing a bill of scandal." The court found the verdict inadequate as a conviction under the indictment. One of the main considerations in that case was the fact that the jury was composed of ignorant Germans. There was a doubt expressed by the court that the conviction was intended, and the accused was rightfully given the benefit of the doubt. The court seemed impressed by the argument of counsel that "a" bill of scandal in the German language meant an entirely different thing from what it did in the English language, and that there was a strong possibility that the jury had confused the meanings.

Whatever the most unlettered persons might understand the meaning of "the" to be, the courts have taken the position that "the" does not always particularize.¹² The restriction put on its meaning in the Scharff case appears not to have been generally applied, and has been specifically repudiated in at least one case.¹³

"The" has often been interpreted as meaning "all" or "all of the," and has just as frequently been construed to mean "any."¹⁴ The leading case in which it has been given the latter construction is *Noyes et al. v. Children's Aid Society*.¹⁵ A statute providing that a surrogate might award costs to "the party . . . entitled" was construed to mean that he might award costs to both or all parties. In refusing to apply a restrictive meaning to "the," the court said:

"It is argued that the use of the definite article 'the' in connection with the phrase 'party entitled,' shows that the Legislature meant that the surrogate should determine which one party in particular, of all contesting before him, is entitled to costs. This is too narrow as a matter of definition. It is manifest that of all our uses of the article 'The,' it directs what particular thing or things we are to take or assume as spoken of. 'The' (says Dr. Lowth), 'determines what particular thing is meant, *i. e.*, what particular thing we are to assume to be meant.' (Richardson's Dicty, *in voce*.) Yet this article is not always to mean but one. Take the well-worn and well-wearing quotation: 'The man that hath not music in himself, is fit for

¹²Jackson v. Quarry Realty Co., 23 S. W. (Mo. 1921) 1063, 1066.

¹³Gary Realty Co. v. Swinney, 269 S. W. (Mo. 1925) 961.

¹⁴Born v. Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. Rep. 300 (1900); Boston & M. R. R. v. Concord, 98 Atl. (N. H. 1916) 66, 67; Dooley v. Penland, 300 S. W. (Tenn. 1927) 9, 11. For some other interpretations of "the" see: Craig v. Boyes, 11 P. (2d) (Cal. 1932) 673, 674; Trustees of Unitarian Society v. Tufts, 23 N. E. (Mass. 1890) 1006, 7 L. R. A. 390; Spencer v. State, 90 S. W. (Tex. Cr. App. 1905) 638, 639; Harris v. State, 24 S. W. (Tex. Cr. App. 1893) 290.

¹⁵10 N. Y. 481 (1877).

treason, stratagem, and spoils.' The meaning of the article is not exhausted, when one man is found with no music in himself. 'The man' means there, 'any man.' So, in this statute, 'the party entitled' means 'any party entitled.'"

The Georgia court followed the Noyes case in their decision in the case of *Howell v. State*.¹⁶ They held that "the" has "various special uses. Among these special uses, it is placed before a noun as denoting what is well known. It is used before a generic noun to indicate it as such. 'The grasshopper shall be a burden.' Eccl. XII. 5. . . . the article as used in statutes is often used in the sense of any."

There is no lack of authority for giving "the" the same meaning as "any."¹⁷ However, in the last analysis, "there seems to be no settled rules for its construction. Much must of necessity be left to the context, and to the objects and purposes of the statute in which it is found."¹⁸

An examination of the context of the statute in question reveals nothing to aid us in its interpretation. Although such a provision is not generally included in the statutes of the other states, the phrase "not being pardoned before being sent there" would have neither a restrictive nor expansive effect on our statute. The general effect of a pardon is the same in all states, at least insofar as any elements which might affect the marriage relation are concerned.¹⁹

Neither does an examination of the objects and purposes of the statute reveal any information that might lead to a solution of the problem. The cause for divorce is evidently based either on the disgrace to be borne or the loss of consortium. In either case, the effect of a sentence outside the state would be the same as one within.

A great deal of weight must be given to Chancellor Amis' argument that the divorce law of this state is an integral part of the whole system. A similar argument is made in the Reynolds case, *supra*. It must be admitted that a number of difficulties would arise from an extension of the operation of the statute, due to the differences in the penal laws involved; but it seems to the writer that these difficulties should not outweigh the inconsistencies and injustices attendant upon a situation in which a woman whose husband shot a man on the streets of a border town in Mississippi could procure a divorce here, while one whose husband walked five miles to the state line and shot a man would have to establish a residence in the neighboring state—assuming that they had a similar statute—and one whose husband walked into the Federal post office and shot a

¹⁶138 S. E. (Ga. 1927) 206, 210.

¹⁷For other instances in which courts have interpreted "the" to mean "a" or "any," see: Gary Realty Co. v. Swinney, 269 S. W. (Mo. 1925) 961; Jackson v. Quarry Realty Co., 231 S. W. (Mo. 1921) 1063, 1066; Schulz v. Boyd, 32 S. W. (2d) (Tex. Civ. App. 1930) 483, 484.

¹⁸Anundson v. Standard Printing Co., 105 N. W. (Iowa) 424, 426.

¹⁹For the effect of a pardon in Mississippi, see: Miss. Const. 1890, §§ 241, 253 and Jones v. Board of Registrars, 56 Miss. 766 (1879).

man under the same circumstances could not secure a divorce at all.²⁰

The second question which arises out of the Mississippi statute is with reference to the time of conviction. Would a sentence before marriage give a good cause for divorce if the complainant had no knowledge of it?

An investigation of this question reveals the fact that "Being sentenced" might possibly be construed as referring to a status which existed at the time of the marriage,²¹ but such a construction would obviously be strained. An old Virginia statute²² appears to have made concealment of a previous conviction of felony a ground for divorce, but this is not a common ground, and no such meaning can be reasonably implied from our statute.

If a remedy exists for a complainant whose spouse concealed the fact of a previous conviction of a felony, it lies in an action to annul and not an action for divorce. This leads us to a consideration of the law of annulment for fraud.

Although the doctrine has been specifically repudiated in England,²³ it is generally recognized²⁴ in this country that equity courts have jurisdiction to annul marriages for fraud, on application of the injured party.²⁵ This jurisdiction arises from the fact that marriage is a contract and equity has jurisdiction to set aside contracts for fraud.²⁶ Although there appears to be no reported case of an annulment of a marriage in Mississippi for fraud, there is little doubt but that our chancery courts possess the power to decree such an annulment.²⁷ The fact that there is a divorce statute dealing with the subject does not preclude the common-law remedy.²⁸

However, a very difficult problem arises when we come to consider what fraud will vitiate the marriage contract. This is a point about which there is a great deal of conflict and confusion. The determination of this question is a matter of weighing the rights of the complainant under the ordinary law of fraud as affecting contracts, against the interests of the public.

²⁰It has been held that such a sentence does not amount to cruel and inhuman treatment, *Dion v. Dion*, 100 N. W. (Minn. 1904) 1101; or to desertion, *Truman v. Truman*, 171 Atl. (Del. 1934) 453.

²¹See *Guaranty Trust Co. of New York v. Koehler*, 195 Fed. 669, 679 (C. C. A. 8th, 1912); *In Re Douglas Coal and Coke Co.*, 131 Fed. 769, 773 (E. D. Tenn. 1904).

²²See SCHOULER, *MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS* (6th ed. 1921) 1788.

²³*Moss v. Moss*, L. R. Prob. 263 (1897); *Sullivan v. Sullivan*, 2 Hagg. Cons. 238, 161 Eng. Rep. 728 (1818) in which it was said (2 Hagg. Cons. 248, 161 Eng. Rep. 732): "If he is capable of consenting and has consented, the law does not ask how the consent has been induced."

²⁴*Contra: Eisenberg v. Eisenberg*, 105 Pa. Super. 30, 160 Atl. 228 (1932).

²⁵*Carris v. Carris*, 24 N. J. Eq. 516 (1873); 9 R. C. L. 293, § 61; Note, 9 L. R. A. 505.

²⁶*Ibid.* See also, *Main v. Main*, 113 Miss. 165, 74 So. 138 (1917).

²⁷*AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI* (1935) 59, § 34. See also, *Marsh v. Whittington*, 88 Miss. 400, 40 So. 326 (1906).

²⁸*Parkinson v. Mills*, 159 So. (Miss. 1935) 651, 656; 9 R. C. L. 294, § 34.

Two well defined views grew up in this country as to the class of fraud necessary to invalidate a marriage. The Massachusetts courts early laid down the rule that the fraud must go to the very essentials of the marriage relation.²⁹ This rule was generally followed throughout the country for some time.³⁰ In the language of the court:

"... no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation exists."

The generally accepted doctrine in the New York courts is that any fraud without the presence of which the complainant would not have entered into the marriage contract is sufficient ground for annulment.³¹ The rule is stated in the leading case of *Di Lorenzo v. Di Lorenzo*³² as follows:

"If the plaintiff proves to the satisfaction of the court that through misrepresentation of some fact which was an essential element in the giving of his consent to the contract of marriage, and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, and the court is empowered to annul the marriage."

This doctrine, while generally followed in New York, is usually regarded as extreme. There are several factors which may have combined to influence the New York courts to extend the doctrine of annulment for fraud so far. One of them is probably the growing public disregard of the sacredness of the marriage relation. Another, as is suggested by the court in the case of *Wells v. Talham*,³³ is the fact that the divorce laws of New York are so strict. This factor was given some weight by the minority judges in the South Carolina case of *Jakar v. Jakar*.³⁴ Still another influential consideration is the fact that there is a statute in New York providing specifically that marriages may be annulled for fraud.³⁵

²⁹*Reynolds v. Reynolds*, 3 Allen (Mass.) 605.

³⁰*Raia v. Raia*, 214 Ala. 391, 108 So. 11 (1926); *Williams v. Williams*, 118 Atl. (Del. 1922) 638; *Bielby v. Bielby*, 333 Ill. 478, 165 N. E. 231 (1929); *Cassin v. Cassin*, 161 N. E. (Mass. 1928) 603; *Carris v. Carris*, 24 N. J. Eq. 516 (1873); *Griffin v. Griffin*, 122 Misc. Rep. 837, 204 N. Y. S. 131 (1924); *Heath v. Heath*, 159 Atl. (N. H. 1932); *Wells v. Talham*, 180 Wis. 654, 194 N. W. 36, 33 A. L. R. 827 (1923); 9 R. C. L. 294, § 35.

³¹*Aufiero v. Aufiero*, 222 App. Div. 479, 226 N. Y. S. 611; *Rutstein v. Rutstein*, 221 App. Div. 70, 222 N. Y. S. 688 (1927); *O'Connell v. O'Connell*, 201 App. Div. 338, 194 N. Y. S. 265 (1922); *Libman v. Libman*, 102 Misc. Rep. 443, 169 N. Y. S. 900 (1918); *Weill v. Weill*, 104 Misc. Rep. 561, 172 N. Y. S. 589 (1918); *Robert v. Robert*, 87 Misc. Rep. 629, 150 N. Y. S. 366 (1914); *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609 (1903).

³²174 N. Y. 467, 67 N. E. 63 (1903).

³³180 Wis. 654, 194 N. W. 36, 33 A. L. R. 827, 831 (1923).

³⁴102 S. E. (S. C. 1920) 337.

³⁵See *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63 (1903).

It remained for the New Jersey courts to lay down a rule with which both lines of authority can, in a measure, be reconciled, in so far as decided cases are concerned. That rule is best stated by Vice-chancellor Stevenson in the case of *Cox v. Cox*:³⁶

"An unconsummated marriage which is infected with fraud of any kind whatsoever, which would render a contract voidable, is voidable at the option of the injured party if promptly disaffirmed before any change of status has occurred."

He answers the public policy argument in the later case of *Ysern v. Horter*:³⁷

"... it is important to ascertain whether the case presents merely an instance of the utterance of a few words expressive of a consent to a marriage, or such words have been followed by sexual intercourse, cohabitation, and the creation of a status involving the interests of children and the preservation of the morals of society."

These two decisions of Vice-chancellor Stevenson have been accepted as the basis of New Jersey decisions,³⁸ and the rule laid down has found favor in several other states.³⁹ In the *Cox* case, *supra*, the Vice-chancellor cites several precedents for his decision. It seems that a distinction between consummated and non-consummated marriages was first indicated in the cases of *Robertson v. Cole*,⁴⁰ and *Lyndon v. Lyndon*.⁴¹ However, the absence of consummation in these cases was relied on only to show repudiation of the contract. Bishop seems to have early recognized the distinction.⁴² Writing in 1891, he states:⁴³

"There are cases⁴⁴ in which the distinction between marriage consummated and not consummated would have been important, but it was not suggested by counsel and did not occur to the unaided thoughts of the judges."

The absence of consummation was a strong factor in deciding the case of *Smith v. Smith*,⁴⁵ but the first case in which the absence of consummation was the moving force in holding ordinary fraud sufficient seems to have been *Svenson v. Svenson*.⁴⁶ This case is heavily relied on in the *Cox* and *Ysern* cases. It is also made the basis of the decision in the later New York case of *Griffin v. Griffin*,⁴⁷ which further clarifies the rule by adding:

³⁶1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION (1891) §§ 456-462.

³⁷*Id.* at § 462.

³⁸*Weir v. Still*, 31 Iowa 107 (1870).

³⁹178 N. Y. 54, 70 N. E. 120 (1904).

⁴⁰110 Atl. 924 (N. J. Eq. 1909, reported 1920).

⁴¹91 N. J. Eq. 189, 110 Atl. 31 (1920).

⁴²*Caruso v. Caruso*, 146 Atl. 649 (N. J. Eq. 1929); *Dooley v. Dooley*, 93 N. J. Eq. 22, 115 Atl. 268 (1921).

⁴³*Christlieb v. Christlieb*, 71 Ind. App. 682, 125 N. E. 486 (1919); *Corder v. Corder*, 141 Md. 114, 117 Atl. 119 (1922); *Griffin v. Griffin*, 122 Misc. Rep. 837, 204 N. Y. S. 131 (1924).

⁴⁴12 Tex. 356 (1854).

⁴⁵69 Ill. 43 (1873).

⁴⁶171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440 (1898).

⁴⁷*Griffin v. Griffin*, 122 Misc. Rep. 837, 204 N. Y. S. 131 (1924).

"After consummation and development of the relationship into a public status, the fraud is not material unless it goes to the essentials of the contract."

The question of whether or not there has been consummation has not always been left for the jury to decide. The court, in the case of *Caruso v. Caruso*,⁴⁸ held that where the complainant had made the defendant pregnant before marriage, but there had been no consummation since the marriage, the birth of the child after marriage would relate back to the pre-nuptial intercourse and the marriage would be considered consummated. Consequently, fraud going to the essentials had to be shown. The Mississippi court has held that the mere living together as husband and wife constitutes cohabitation, in spite of uncontradicted testimony that there was no coition.⁴⁹ The majority of the court in the case of *Jakar v. Jakar*⁵⁰ seem to have considered cohabitation as conclusive evidence of consummation. The courts seem disinclined to give effect to testimony which contradicts the popular belief and the natural course of events. Presumptions are set up, either conclusive or requiring strong evidence to overcome.⁵¹

Is the New Jersey rule a workable one? It is certainly open to some objections. It will not satisfy the religious beliefs of a large number of people. It is doubtful whether the test laid down in the rule is one that coincides with the popular mind. Doubtless, it will open the way to numerous frauds on the court. However, the rule has become a popular one, and with the presumptions which have already arisen and those which undoubtedly will arise, it may well become the standard solution of the question.

When one tries to determine what fraud goes to the essentials of the marriage relation, he runs into a broad criterion and a maze of conflicting opinions. The only criterion which can be safely set up as a gauge is public policy. This is variously characterized⁵² as common-law essentials, public policy, well defined public opinion, and standards of a large proportion of the community. The application of this criterion, however, often leads to varying results.

There are other factors than those considered which, at one time or another, have had considerable influence on the courts in considering annulment for fraud. These factors are: age of the parties,⁵³ extent of inquiries made before marriage,⁵⁴ the presence or absence of children⁵⁵ and property rights involved.⁵⁶

⁴⁸146 Atl. (N. J. Eq. 1929) 649, 651.

⁴⁹Hunt v. Hunt, 172 Miss. 732, 161 So. 119 (1935). See the discussion of this case, 8 Miss. L. J. 312 (1936).

⁵⁰102 S. E. (S. C. 1920) 337.

⁵¹Similar presumptions may be found in *Cox v. State*, 117 Ala. 103, 23 So. 806, and *Burns v. Burns*, 60 Ind. 259 (1877).

⁵²*Carris v. Carris*, 24 N. J. Eq. 516 (1873); *Libman v. Libman*, 102 Misc. Rep. 443, 169 N. Y. S. 900 (1918); *Heath v. Heath*, 159 Atl. (N. H. 1932) 418.

⁵³*Raia v. Raia*, 214 Ala. 391, 108 So. 11 (1926); *King v. Brewer*, 8 Misc. Rep. 587, 29 N. Y. S. 1114 (1894).

⁵⁴*King v. Brewer*, 8 Misc. 597, 29 N. Y. S. 1114 (1894).

⁵⁵*Ibid.*

From the application of these principles to the case of a wife whose husband had been sentenced to the penitentiary, before their marriage, and without her knowledge, what result would be obtained? Would the concealment of such fact constitute such a fraud as to give sufficient grounds for annulment?

If the marriage was not consummated, such concealment would probably be sufficient ground for annulment in most states. The case of *Wier v. Still*⁵⁷ held that such concealment was not a sufficient ground for annulment. However, no distinction was sought to be made in that case between consummated marriages and those not consummated.

Most courts would probably hold a sentence to the penitentiary which has been completed before marriage an insufficient ground for annulment of a consummated marriage. Such concealment only goes to the character of the defendant and does not touch the legally recognized essentials of the marriage relation. The New York courts, in the case of *Keyes v. Keyes*,⁵⁸ held that such concealment did furnish sufficient grounds for annulment, even after consummation. There were two things, however, that seemed to have especial weight with the court. One of these was the fact that the defendant's picture was in the rouges' gallery, and the other was the fact that he didn't reform after marriage, but was again imprisoned, and his wife deprived of consortium.⁵⁹

If the sentence was not served before marriage, and the defendant is an escaped convict, then annulment should be decreed whether the marriage was consummated or not. The fraud in such a case goes to one of the common-law essentials of the marriage relation, namely, consortium.

So, it appears that there are a great many cases in which a sentence of one's spouse to the penitentiary would constitute good ground for annulment, even though relief under the divorce statutes would be denied. It must be remembered, however, that these conclusions are based on the general law on the subject. The total absence of authority in Mississippi would make a prediction as to the position of our courts too hazardous to attempt.

Regardless of the merits of the arguments for or against restricting the application of our divorce statute, and of the possibilities

⁵⁶*Griffin v. Griffin*, 122 Misc. Rep. 837, 204 N. Y. S. 131 (1924).

⁵⁷31 Iowa 107 (1870).

⁵⁸6 Misc. Rep. 355, 26 N. Y. S. 910 (1893).

⁵⁹See the case of *Brown v. Scott*, 141 Md. 114, 117 Atl. 114 (1922). In that case certain representations of character and position were made, one of which was that the defendant was a Federal officer. After the marriage, the defendant was sentenced to the Federal penitentiary for his acts impersonating a Federal officer. The court granted an annulment on the ground that the fraud went to the essentials of the contract, but failed to clearly distinguish these representations from other representations of character which are uniformly held not to go to the essentials of the marriage relation. The true basis of the decision should be the fact that the defendant disabled himself from ability to furnish his wife one of the common-law essentials of the marriage relation, namely, consortium.

of securing an annulment in cases where a divorce would be unobtainable, the legislature should supply the few necessary words to clarify the meaning of the statute.

THOMAS Y. MINNIECE.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAW — TAXATION — VALIDITY OF CHAIN STORE TAXES.

One of the latest devices resorted to by the states "to insure revenue and foster their local interest"¹ is the chain store tax. First enacted by North Carolina in 1927,² these taxes have been imposed in more than a score of states³ since the United States Supreme Court sustained their constitutionality in *Tax Com'rs. v. Jackson*,⁴ decided in 1930. The act of Indiana,⁵ there complained of was a graduated privilege tax. This, and one other method of chain store taxation,⁶ are thus far the only ones to receive the court's stamp of approval as measures within the requirements of the Constitution. An act of Kentucky⁷ attempting to impose a gross receipt tax determined by the volume of such receipts was declared arbitrary and discriminatory in violation of the equal protection clause of the Fourteenth Amendment.⁸ On the authority of that decision, a provision in Florida's latest chain store act,⁹ which sought to exact a similar tax graduated according to the number of stores in the chain, was held unconstitutional by the supreme court of that state¹⁰ and a district federal court.¹¹ With these exceptions, the statutes on the subject are substantially the same as the one¹² sustained in *Tax Com'rs. v. Jackson*,¹³ and the scope of this comment is confined to a consideration of this type of act.

¹Ohio Oil Co. v. Conway, 281 U. S. 146, 50 S. Ct. 310, 313, 74 L. Ed. 775 (1930).

²N. C. Laws 1927 c. 80 § 443 (Revenue measure imposing a tax on operation of more than six stores under single management) held, unconstitutional in *Great Atl. & Pac. Tea Co. v. Doughton*, 196 N. C. 145, 144 S. E. 701 (1928). Cf. *Great Atl. & Pac. Tea Co. v. Maxwell*, 199 N. C. 433, 154 S. E. 838 (1930), where a later revenue act imposing the tax on two or more was held to be imposed in accordance with the privilege exercised, and constitutional.

³Acts cited in note, 79 L. Ed. 1045.

⁴283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464 (1930).

⁵Ind. Acts 1929, c. 207, p. 693.

⁶Va. Laws 1928 c. 45 (privilege tax on distributing houses of the chains) held, constitutional in *Great Atl. & Pac. Tea Co. v. Morrisett*, 58 F. (2d) 991 (D. C. 1931), and *Tax Com'r. v. Bibee Groc. Co.*, 153 Va. 935, 151 S. E. 293 (1930).

⁷Ky. Acts 1930, p. 475.

⁸*Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054 (1935).

⁹Fla. Laws 1935 c. 16848, § 4, subdiv. B.

¹⁰*State v. Simpson*, 166 So. (Fla. 1936) 227.

¹¹*Lane Drug Stores, Inc. v. Lee*, 11 F. Supp. 672 (D. C. 1935).

¹²Ind. Acts of 1929 c. 207, p. 693.

¹³283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1930).

The tax, under these acts, is placed on the operation of a chain of stores and not on the stores of the chain.¹⁴ The number of such stores merely furnishes the basis of the classification in determining the amount of the tax.¹⁵ In some of the statutes the tax increases with the addition of every store,¹⁶ in others only when several are added.¹⁷ Some provide that the increase in amount shall be confined to the additional store,¹⁸ but others¹⁹ are "retroactive,"²⁰ that is, when enough stores are added to a chain already existing to place that chain in a higher tax bracket, there is an increase not on merely the additional store, but on all the stores of the chain.²¹ Thus in the latest Mississippi statute²² the rate on twenty-six stores or over, and any number not in excess of thirty, is one hundred and twenty-five dollars for each store,²³ while that on thirty-one or over, and not in excess of forty, is two hundred dollars.²⁴ When one store is added to an existing chain of thirty, the tax increase extends to all of the thirty-one, making the tax for the privilege of opening the thirty-first store twenty-four hundred and fifty dollars, instead of two hundred, as it would be under the system employed in the Indiana Act.²⁵

Even in the light of precedents and their fine drawn distinctions in classifying for purposes of taxation,²⁶ the difference between the occupation of operating two stores, and that of operating one, is a

¹⁴*Ibid.*; *Liggett v. Lee*, 288 U. S. 517, 53 S. Ct. 481, 77 L. Ed. 929 (1933); *Fox v. Standard Oil Co.*, 294 U. S. 87, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

¹⁵*Tax Com'rs. v. Jackson*, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1930).

¹⁶*Idaho Session Laws 1933*, c. 113, § 5. Held constitutional in *J. C. Penney Co. v. Diefendorf, Com'r.*, 32 P. (2d) (Idaho 1934) 784; *State v. Simpson*, 166 So. (Fla. 1936) 227.

¹⁷*Senate Bill No. 56* (Miss. 1936); *Ind. Acts 1929*, c. 207, p. 693; *House Bill No. 112* (W. Va.); *Fla. Laws 1935*, c. 16848, § 4, subd. A (repealing *Fla. Laws 1933*, c. 16071).

¹⁸*Ind. Acts 1929*, c. 207, p. 693; *House Bill N. 112* (W. Va.); *Fla. Laws 1931*, c. 14650, § 24 (repealed, *Fla. Laws 1933*, c. 16071).

¹⁹*Senate Bill No. 56* (Miss. 1936); *Idaho Session Laws 1933*, c. 113, § 5; *Fla. Laws 1935*, c. 16848.

²⁰The word is used for its descriptive value only, and not in its technical connotation. See *J. C. Penney Co. v. Diefendorf*, 54 Idaho, 374, 32 P. (2d) 784 (1934).

²¹*State v. Simpson*, 166 So. (Fla. 1936) 227, 237.

²²*Senate Bill No. 56* (1936). An earlier tax (*Laws 1930*, c. 90, art. 1, § 2-c) imposing, in addition to all others, a tax equivalent to one-fourth of one per cent of the gross income from the operation of more than five stores by one person, was declared constitutional in *Penney Stores v. Mitchell*, 59 F. (2d) 789 (S. D. Miss. 1932), dismissed per stipulation of counsel in 287 U. S. 672, 53 S. Ct. 122, 77 L. Ed. 580. But *cf. State v. Simpson*, 166 So. (Fla. 1936) 227, 235; *Lane v. Lee*, 11 F. Supp. 672, 675 (N. D. Fla. 1935).

²³*Senate Bill No. 56*, § 2 (f) (Miss. 1936).

²⁴*Id.*, § 2 (g).

²⁵*Ind. Acts 1929*, c. 207, p. 693.

²⁶*Am. Sugar Ref. Co. v. La.*, 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43 (1900); *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. Ed. 451, 26 S. Ct. 232 (1906); *Quong Wing v. Kirkendall*, 233 U. S. 59, 56 L. Ed. 350, 32 S. Ct. 192 (1912); *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61, 57 L. Ed. 730,

difficult conception to grasp. Yet the United States Supreme Court has held that the difference is a substantial one,²⁷ and that the legislature does not exceed its discretion²⁸ to classify under the "equal protection" and "due process" clauses of the Fourteenth Amendment.²⁹ Their requirements are satisfied if the classification adopted is not arbitrary or unreasonable,³⁰ and has a just relation to the purpose of the act in which it is made.³¹ Following this established test of constitutionality the court, in *Tax Com'rs. v. Jackson*³² said, "Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great." Mere discrimination is not sufficient to render a classification repugnant to the Amendment; there must be an arbitrary discrimination, and no discrimination is arbitrary if founded on a reasonable distinction³³ or "any state of facts reasonably can be conceived to sustain it."³⁴

33 S. Ct. 441 (1913); *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 58 L. Ed. 974, 34 S. Ct. 493 (1914); *Alaska Fish, etc. Co. v. Smith*, 255 U. S. 44, 65 L. Ed. 489, 41 S. Ct. 219 (1921); *Rast v. Van Deman Co.*, 240 U. S. 342, 60 L. Ed. 679, 36 S. Ct. 370 (1916).

²⁷*Tax Com'rs. v. Jackson*, 283 U. S. 527, 541, 51 S. Ct. 540, 75 L. Ed. 1248 (1930); *Liggett v. Lee*, 288 U. S. 517, 532, 53 S. Ct. 481, 77 L. Ed. 929 (1933); *Fox v. Standard Oil Co.*, 294 U. S. 87, 103, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

²⁸*Singer Co. v. Brickell*, 233 U. S. 304, 58 L. Ed. 974, 34 S. Ct. 493 (1914).

²⁹So far as the power to classify is concerned, the two requirements of the two clauses are the same. *Fox v. Standard Oil Co.*, 294 U. S. 87, 103, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

³⁰*Brown-Forman Co. v. Ky.*, 217 U. S. 563, 573, 54 L. Ed. 883, 30 S. Ct. 578 (1910); *Chicago, etc. R. R. Co. v. McGuire*, 219 U. S. 549, 31 S. Ct. 259, 261, 55 L. Ed. 328 (1911); *Quong Wing v. Kirkendall*, 233 U. S. 59, 62, 56 L. Ed. 350, 32 S. Ct. 192 (1912); *Singer Co. v. Brickell*, 237 U. S. 304, 315, 58 L. Ed. 974, 34 S. Ct. 493 (1914); *Rast v. Van Deman & Lacy Co.*, 240 U. S. 342, 357, 60 L. Ed. 679, 36 S. Ct. 370 (1916); *F. S. Royster Guano Co. v. Va.*, 253 U. S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560 (1920); *Quaker City Cab Co. v. Penn.*, 277 U. S. 389, 402, 72 L. Ed. 927, 48 S. Ct. 553 (1928); *Tax Com'rs. v. Jackson*, 283 U. S. 527, 537, 75 L. Ed. 1248, 51 S. Ct. 540 (1930).

³¹*Gulf, etc. R. R. Co. v. Ellis*, 165 U. S. 150, 165, 41 L. Ed. 666, 17 S. Ct. 252 (1897); *Cargill v. Minn.*, 180 U. S. 452, 469, 45 L. Ed. 619, 21 S. Ct. 423 (1901); *F. S. Royster Guano Co. v. Va.*, 253 U. S. 412, 416, 64 L. Ed. 989, 40 S. Ct. 560 (1920); *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37, 72 L. Ed. 770, 48 S. Ct. 423 (1928); *Quaker City Cab Co. v. Pa.*, 277 U. S. 389, 402, 72 L. Ed. 927, 48 S. Ct. 553 (1928).

³²283 U. S. 527, 537, 75 L. Ed. 1248, 51 S. Ct. 540 (1930).

³³*American Sugar Ref. Co. v. La.*, 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43 (1900).

³⁴*Rast v. Van Deman Co.*, 240 U. S. 342, 357, 60 L. Ed. 679, 36 S. Ct. 370 (1916); *Alaska Fish, etc. Co. v. Smith*, 255 U. S. 44, 63 L. Ed. 489, 41 S. Ct. 219 (1921); *Tax Com'rs. v. Jackson*, 283 U. S. 527, 540, 75 L. Ed. 1248, 51 S. Ct. 540 (1930). But see *Gulf, etc. R. R. Co. v. Ellis*, 165 U. S. 150, 165, 41 L. Ed. 666, 17 S. Ct. 252 (1897), where Brewer, J., said, "While good faith and a knowledge of existing conditions on the part of the legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some unknown and undisclosed reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

Two instances of such an arbitrary discrimination were alleged to exist in the tax before the court in the *Jackson case*.³⁵ The first was the taxation of chain stores separate from independent stores operating under co-operative buying agreements. The second was their taxation apart from large single establishments. Complainant's first contention was dismissed by the court with the statement that "in the nature of things" a volunteer chain could not be as efficiently and successfully integrated as a group subject to central control. The evidence offered to demonstrate the similarity of large single store and chain operation, and to sustain the second contention showed that there were two department stores, in the same city, where all of complainant's stores were located, doing a business eight times as large as complainant's entire chain, while complainant under the provisions of the statute would be required to pay a tax eighteen hundred times as large. Some of the distinguishing features listed as controlling the decision against this last argument were the possibilities for greater specialization in management and methods and the greater advantages for mass buying. The decision in this particular case is considerably weakened by the dissenting opinion of Mr. Justice Sutherland,³⁶ based on the testimony of the state's expert witness that there were no advantages in chain operation not inherent in volume and management, regardless of whether the business is a chain or a single store.³⁷ He concluded that this (together with the fact that the classification adopted is not limited to those chains dealing in a single type of merchandise)³⁸ makes the tax depend on "the mere circumstances—wholly irrelevant so far as any of the advantages claimed are concerned—that the business is one carried on under many roofs, and that of the other under one only."³⁹ However, as the Supreme Court has said in a later case,⁴⁰ "Whatever may be said of individual similarities and differences between chain operation and the conduct of a single store or department store, the former employ distinguishable methods of conducting business, and the legislatures may make the difference in method and the character of the business the basis of classification for taxation."⁴¹

Admitting, then, that the occupation of conducting a chain of stores is in a class by itself for the purposes of taxation; yet, all

³⁵Ind. Acts 1929, c. 207, p. 693.

³⁶Tax Com'rs. v. Jackson, 283 U. S. 527, 543, 51 S. Ct. 540, 75 L. Ed. 1248 (1930).

³⁷Tax Com'rs. v. Jackson, 283 U. S. 527, 547, 51 S. Ct. 540, 75 L. Ed. 1248 (1930).

³⁸It seems that the only material difference between chains and independent stores operating under co-operative buying agreements is the character of ownership. See Tax Com'rs. v. Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1930). Cf. Quaker City Cab Co. v. Penn., 277 U. S. 389, 402, 72 L. Ed. 927, 48 S. Ct. 553 (1928).

³⁹Tax Com'rs. v. Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. E. 1248 (1930) (dissenting opinion).

⁴⁰Liggett v. Lee, 288 U. S. 517, 532, 53 S. Ct. 481, 77 L. Ed. 929 (1933).

⁴¹See Great Atl. & Pac. Tea Co. v. Maxwell, 284 U. S. 575, 52 S. Ct. 26, 76 L. Ed. 500 where both Justice Van Deventer and Justice Sutherland regarded the question as closed.

chains do not receive the same treatment under the system of graduation employed in the statutes, and the Constitution requires that every act shall have regard for the presence of a reasonable relation between the basis of the classification and the privilege to be enjoyed.⁴² The precedent relied on to sustain this feature of the statutes is the *Magoun Inheritance Tax Case*.⁴³ There the United States Supreme Court upheld an Illinois act imposing a tax on the right to inherit determined by the amount of the inheritance, just as the tax in the acts under consideration is determined by the number of stores in the chain. Appellant there attempted to demonstrate the inequality of the statute by showing that as between two persons, one immediately below and other immediately above the point where the increase in the percentage collectable takes place, the one to receive the more valuable legacy actually receives less money after deducting the tax.⁴⁴ The court held, however, that such illustrations furnished no test of the practical operation of the classification, saying, "When the legacies differ in substantial extent, if the rate increases, the benefit increases to greater degree."⁴⁵ The court then goes on to say that the rule of equality requires only that the law shall operate on all alike, and the tax is not on money but on the right to inherit and might be graded according to the value of that inheritance. To cite this case, however, is to beg the very question to be decided, namely, that there is a reasonable relation to be found between the amount demanded and the privilege exercised, for, manifestly, in the *Magoun Case* the value of the privilege increases with the amount of the inheritance, where that inheritance is money. But does the value of the privilege exercised under a graduated chain store tax increase with the number of stores operated? The court has answered the question in the affirmative, relying on a principle, first applied in the case of *Metropolis v. Chicago*,⁴⁶ that there must be an advantage in expansion or the chains would not expand,⁴⁷ and, "if it be so universal in the practice of business it would seem not unreasonable if it be adopted as the basis of governmental action."⁴⁸ In order to show inequality, necessary to discrimination, there must be a comparison of the members, in one level with those in another,⁴⁹

⁴²*Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 79 L. Ed. 1054, 55 S. Ct. 525 (1935).

⁴³*Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594 (1898).

⁴⁴The tax on a legacy of ten thousand dollars was three per cent., and over that amount it was four per cent. Thus the legatee of ten thousand and one dollars actually received ninety odd dollars less than the legatee of ten thousand dollars. *Magoun v. Bank*, 170 U. S. 283, 299, 42 L. Ed. 1037, 18 S. Ct. 594 (1898).

⁴⁵*Magoun v. Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594 (1898).

⁴⁶228 U. S. 61, 57 L. Ed. 730, 33 S. Ct. 441 (1913).

⁴⁷*Tax Com'rs. v. Jackson*, 283 U. S. 527, 541, 75 L. Ed. 1248, 51 S. Ct. 540 (1930).

⁴⁸*Metropolis v. Chicago*, 228 U. S. 61, 69, 57 L. Ed. 730, 33 S. Ct. 441 (1913).

⁴⁹*Magoun v. Bank*, 170 U. S. 283, 300, 42 L. Ed. 1037, 18 S. Ct. 594 (1898); *Clark v. Titusville*, 184 U. S. 329, 46 L. Ed. 569, 22 S. Ct. 382 (1902); *State v. Simpson*, 166 So. 7 (Fla. 1936) 236.

to do so is to "stress details"⁵⁰ and ignore the general operation of the statute, the only criterion of its validity.⁵¹ Though, none of the acts passed on by the Supreme Court thus far have contained the "retroactive" feature previously mentioned, it has been sustained by several courts,⁵² and the United States Supreme Court has itself indicated a view favorable to its validity.⁵³

It is at once apparent that as between two chains composed of the same number of units, inequality will exist to an even greater extent than in most classifications by numbers.⁵⁴ What might be an irksome triviality in one instance would confiscate in another.⁵⁵ The court, however, has refused to rule that such inequality of operation would constitute an arbitrary discrimination, or that a "sacrifice of profits" by groups within the class would render the classification void, saying, "The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict."⁵⁶ The legislatures in some of the states have ameliorated the harshness of this classification by exemptions of small unit chains,⁵⁷ especially those dealing solely in petroleum products. Though the power to exempt seems to be no greater than the power of the state to classify generally for the purpose of taxation,⁵⁸ the exemption of chains of gasoline stations

⁵⁰*Liggett v. Lee*, 288 U. S. 517, 533, 77 L. Ed. 929, 53 S. Ct. 481 (1933); *State v. Simpson*, 166 So. (Fla. 1936) 236, 244.

⁵¹*Quaker City Cab Co. v. Penn*, 277 U. S. 389, 401, 72 L. Ed. 927, 48 S. Ct. 533 (1928).

⁵²*J. C. Penney v. Kiefendorf*, 54 Idaho 374, 32 P. (2d) 784 (1934); *Lane v. Lee*, 11 F. Supp. 672 (N. D. Fla. 1935); *State v. Simpson*, 166 So. (Fla. 1936) 236. But *cf.* *Great Atl. & Pac. Tea Co. v. Doughton*, 196 N. C. 145, 144 S. E. 701 (1928); *Great Atl. & Pac. Tea Co. v. Maxwell*, 199 N. C. 433, 154 S. E. 838 (1930), *aff'd*, 284 U. S. 575, 76 L. Ed. 500, 52 S. Ct. 26; *Douglas v. South Ga. Groc. Co.*, 180 Ga. 519, 179 S. E. 768 (1935).

⁵³"The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chains cannot be condemned as arbitrary." *Liggett v. Lee*, 288 U. S. 517, 77 L. Ed. 929, 53 S. Ct. 481 (1933). As to whether this is a dictum see the opinions of Justice Buford (dissenting) and Justice Davis (concurring) in *State v. Simpson*, 166 So. (Fla. 1936) 236.

⁵⁴*Cotting v. Kan.*, 183 U. S. 79, 104, 22 S. Ct. 30, 46 L. Ed. 93 (1901); *Tax Com'rs. v. Jackson*, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1930) (dissenting opinion).

⁵⁵*Fox v. Standard Oil Co.*, 294 U. S. 87, 92, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

⁵⁶*Fox v. Standard Oil Co.*, 294 U. S. 102, 79 L. Ed. 781.

⁵⁷Mississippi's act (Senate Bill No. 56) exempts chains of filling stations and stores or show rooms maintained by gas and electric utilities in connection with their offices.

⁵⁸*Louisville Gas Co. v. Coleman*, 277 U. S. 32, 83, 72 L. Ed. 770, 48 S. Ct. 423 (1928); *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 560, 46 L. Ed. 690, 22 S. Ct. 431 (1902); see *Southern Groc. Stores v. S. C.*, 55 F. (2d) 931 (D. C. 1932); *J. C. Penney Co. v. Diefendorf*, 54 Idaho 374, 32 P. (2d) 784 (1934).

has been held valid where both an excise tax on gasoline and a privilege tax on the operation of each unit were in force.⁵⁹

It must be borne in mind that the classifications established by these acts, adopted by the legislatures, and upheld by the courts have all been considered as fulfilling the requirement of having a reasonable relation to the purpose of the legislation making such classification.⁶⁰ The purpose of each act reaching the court has been held to be the raising of revenue.⁶¹ The fact that the acts may contain incidental or "collateral" purposes to regulate does not change their character as tax measures,⁶² nor can such purposes be considered in determining the justness of a classification's relation to the statute embodying it.⁶³ Hence the classification of chain methods apart from other methods of merchandising is sustained as a reasonable one, for the sole purpose of raising revenue.⁶⁴ It must be remembered, too, that once the act is established as one within the power of the legislature to enact, the scope of judicial inquiry is ended.⁶⁵ That the effect of the act will be to accomplish a prohibited end, if sought directly, cannot affect the validity of the act as a tax measure.⁶⁶ Considering the harshness of such a classification by the number of units operated, and the fact that these acts have been held reasonable in the light of their purpose and objects, the conclusion seems inescapable that we have in *Tax Com'rs. v. Jackson* and the decisions following it cases which go to the bounds of constitutional delimitations, and constitute dangerous precedents for future guidance.⁶⁷

Whether or not chain stores are proper subjects for regulation under the police power of the states, is a question on which the Supreme Court has yet to pass. The problem is a material one only in those states where the constitutional requirements for the equality of revenue acts are greater⁶⁸ than those of the Fourteenth Amendment for, as the court has said, "When the power exists the

⁵⁹*Liggett v. Lee*, 288 U. S. 517, 538, 77 L. Ed. 929, 53 S. Ct. 481 (1933).

⁶⁰*Tax Com'rs. v. Jackson*, 283 U. S. 527, 537, 51 S. Ct. 540, 75 L. Ed. 1248 (1930); *Liggett v. Lee*, 288 U. S. 517, 536, 77 L. Ed. 929, 53 S. Ct. 481 (1933); *Fox v. Standard Oil Co.*, 294 U. S. 87, 100, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

⁶¹*Ind. Acts* 1929, c. 207, p. 693; *Fla. Laws* 1931, c. 14650; N. C. Sess. Laws 1929, c. 345, § 162; *House Bill No. 112* (W. Va.).

⁶²*Fox v. Standard Oil Co.*, 294 U. S. 87, 101, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

⁶³*Fox v. Standard Oil Co.*, 294 U. S. 100, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

⁶⁴*Tax Com'rs. v. Jackson*, 283 U. S. 527, 545, 51 S. Ct. 540, 75 L. Ed. 1248 (1930).

⁶⁵*Magnano v. Hamilton*, 292 U. S. 40, 44, 78 L. Ed. 1109, 54 S. Ct. 599 (1934).

⁶⁶See *Fox v. Standard Oil Co.*, 294 U. S. 87, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

⁶⁷*Tax Com'rs. v. Jackson*, 283 U. S. 527, 550, 551, 51 S. Ct. 540, 75 L. Ed. 1248 (1930) (dissenting opinion).

⁶⁸*Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 578, 79 L. Ed. 1054, 55 S. Ct. 525 (1935) (dissenting opinion).

extent of the burden is a matter for the discretion of the legislature."⁶⁹ The liberality of the court in its construction of what is a valid classification for the purposes of taxation for revenue could hardly be demonstrated better than by the fact that the Supreme Court of Indiana,⁷⁰ though recognizing the persuasion of a decision of the United States Supreme Court, refused to hold the same statute⁷¹ involved in the *Jackson case* a valid revenue measure, placing their decision on the ground that it was enacted under the police power, and sustaining the statute as a valid regulation of a business tending toward a monopoly by the extent of its operation.⁷² Though the language used by Mr. Justice Cardozo in *Fox v. Standard Oil Co.*,⁷³ where he said, in speaking of individual stores, "They are independent in name only, for the chain sets the pace, and even in competing they are subject to its mastery," is significant, still the reservation made in *Magnano v. Hamilton*⁷⁴ that an act might be so arbitrary as not to be an exercise of the taxing power at all, is recognized and approved.⁷⁵ Further, the court has held⁷⁶ the power to classify for the purposes of taxation to be greater than that in the exercise of its police power, saying, "It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries, it is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce."

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⁶⁹*Fox v. Standard Oil Co.*, 294 U. S. 87, 100, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

⁷⁰*Midwestern Pet. Corp. v. Tax Com'rs.*, 187 N. E. (Ind. 1933) 882.

⁷¹*Ind. Laws* 1929, c. 207, p. 693.

⁷²*Midwestern Pet. Corp. v. Tax Com'rs.*, 187 N. E. (Ind. 1933) 882, 887.

⁷³*Fox v. Standard Oil Co.*, 294 U. S. 87, 99, 79 L. Ed. 781, 55 S. Ct. 333 (1935).

⁷⁴292 U. S. 40, 44, 78 L. Ed. 1109, 54 S. Ct. 599 (1934).

⁷⁵*Fox v. Standard Oil Co.*, 294 U. S. 87, 100, 79 L. Ed. 781, 55 S. Ct. 333 (1935); see *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 38, 66 L. Ed. 818, 42 S. Ct. 449 (1922), where the Court said, "They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing feature of the so called tax when it loses its character as such and becomes a mere penalty with the characteristic of regulation and punishment."

⁷⁶*Connolly v. Union Pipe Co.*, 184 U. S. 540, 563, 46 L. Ed. 679, 22 S. Ct. 431 (1902).

RECENT IMPORTANT DECISIONS

INSURANCE — EFFECT OF INCONTESTABLE CLAUSE UPON REINSTATED LIFE INSURANCE POLICY.

The life insurance policy of *A* lapsed for non-payment of premiums. Before default, however, the two year incontestable period had run. Several months after default, *A*, in pursuance of the reinstatement clause in the policy, made application therefor, in which he made false warranties as to his health. The policy was reinstated, and two months later *A* died. As a defense to the suit on the policy by *A*'s beneficiary, defendant pleaded the false warranties in the application for reinstatement. Plaintiff then set up affirmatively the two year incontestable clause as a bar thereto. Jury found for the plaintiff. HELD: Reversed and judgment rendered for the defendant. Though the matters covered in the original application and policy remain incontestable after reinstatement, "as to the contract of reinstatement, the incontestable clause takes effect anew upon reinstatement and for the period prescribed, thereby permitting a contest because of fraud in securing the reinstatement." *New York Life Insurance Company v. Burris*, ... Miss...., 165 So. 116 (1936).

The question of the effect of an incontestable clause after reinstatement of an insurance policy has been the subject of much litigation. The rule followed by the majority of states is to the effect that, after reinstatement of a lapsed policy, the reinstated policy is to be considered as a new contract, the contestable period commencing anew from the actual date of reinstatement.¹ Several courts have stated the same rule pronounced in the principal case in a slightly different manner, concluding that no "new contract" is formed, but that the original contract is renewed in full, and that the contestable period begins running anew with reinstatement as to all statements made in obtaining the renewal of the policy.² Thus it was held in the only other Mississippi case in point that "the reinstatement is governed by the same principles as

¹*Pacific Mut. Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. Rep. 862 (1905); *Teeter v. United Life Ins. Ass'n.*, 159 N. Y. 411, 54 N. E. 72 (1899) (affirming (1896) 11 App. Div. 259, 42 N. Y. S. 119); *Northwestern Mutual Life Ins. Co. v. Pickering*, 293 Fed. 496 (1923); *Mutual Life Ins. Co. v. Lovejoy*, 203 Ala. 452, 83 So. 59 (1919); *McCormack v. Security Mut. L. Ins. Co.*, 220 N. Y. 447, 116 N. E. 74 (1917) (reversing on other grounds (1914) 161 App. Div. 33, 146 N. Y. S. 613); *State Life Ins. Co. v. Spencer*, 62 F. (2d) 640 (C. C. A. 5th, 1933), cert. denied in 289 U. S. 746, 77 L. Ed. 1492, 53 S. Ct. 690 (1933); *Columbian Nat. Life Ins. Co. v. Ind. Trust Co.*, 53 R. I. 334, 166 Atl. 809 (1933); see also 3 JOYCE, THE LAW OF INSURANCE (2nd ed.) § 1276b; 5 JOYCE, THE LAW OF INSURANCE (2nd ed.) § 3733h.

²*Mutual Life Ins. Co. v. Dreeben*, 20 F. (2d) 394 (D. C. 1927); *Great Western Life Insurance Co. v. Snavely*, 206 Fed. 20 (C. C. A. 6th), 46 L. R. A. (N. S.) 1056 (1913); *N. Y. Ins. Co. v. Seymour*, 45 F. (2d) 47 (C. C. A. 6th), 73 A. L. R. 1523 (1913); *Wastun v. Lincoln Nat. Life Ins. Co.*, (C. C. A. 8th, 1926) 12 F. (2d) 422 (1926); *Ward v. N. Y. Ins. Co.*, 129 S. C. 121, 123 S. E. 820 (1924); see, also, note (1928) 23 ILL. L. REV. 93; note 94 A. L. R. 1200.

the original application."³ In the case under discussion, the court stated: "There is no new contract of insurance issued, but the reinstatement is rather a contract for the continuance in force of the former contract, and . . . the incontestable clause takes fresh effect."⁴

There is, however, a respectable number of well reasoned cases holding that, upon reinstatement, the incontestable clause does not become a part of the contract for revival of the policy, but that the reinstatement contract is a new, independent agreement, subject to attack for fraud without reference to its incontestable clause.⁵ As a typical statement of this rule, the court in *Texas State Mutual Life Insurance Company v. Rosenberg*⁶ regarded the reinstatement contract "as a waiver of the forfeiture," continuing the old policy, "but reserving the right of the Company to avoid the effect of the reinstatement by showing . . . that it was induced . . . by fraudulent means," the incontestable clause in the policy not being applicable in any manner to the reinstatement contract.

It has also been held that the reinstatement effected the cancellation of a previously incurred forfeiture, and, when the original policy provided for incontestability three years from "date of issue," the "date of issue was the date borne by the old policy."⁷ This obviously unfair rule is based on the illogical concept of a lapse of a right by default, its renewal, and the implicit presumption that, while the right was in abeyance, it was progressively *in esse*. Such a doctrine is at one extreme, and the Texas rule is at the other. The rule propounded in the case at hand seems to be a practical application of the reasonably presumed intent of the parties, and, therefore, the most preferable doctrine.

As affirmative relief, there is no doubt that an equity court has jurisdiction of an insurer's suit for cancellation of a reinstated life insurance policy on the ground of fraud in procuring the reinstatement, where an incontestable clause in the policy, by rendering the defense of the fraud unavailable after the expiration of the stated period, makes the insurer's remedy at law inadequate. Since the incontestable clause precludes the defense of fraud unless

³Franklin Life Ins. Co. v. Jones, 169 Miss. 91, 96, 152 So. 285, 287 (1934).

⁴N. Y. Life Ins. Co. v. Burris, 165 So. 116, 119 (Miss. 1936).

⁵Alper v. N. Y. Life Ins. Co., 41 F. (2d) 956 (1930); Nova Scotia Trust Co. v. Mutual Life Ins. Co., 4 D. L. R. 707 (Nova Scotia 1924); Acacia Mut. Life Ass'n. v. Kaul, 114 N. J. Eq. 491, 169 Atl. 36 (1933); Ash v. Fidelity Mut. Life Ass'n., 26 Tex. Civ. App. 501, 63 S. W. 944 (1901); Chuz v. Columbian Nat. Life Ins. Co., 10 N. J. Misc. Rep. 1145, 162 Atl. 395 (1932) (expressly rejecting Mut. Life Ins. Co. v. Dreeben, 20 F. (2d) 394 (D. C. 1927); Mass. Benefit Life Ass'n. v. Robinson, 104 Ga. 286, 30 S. E. 918 (1898) (holding only bar to contest of fraud in securing reinstatement is statute of limitations); State Mutual Life Ins. Co. v. Rosenberry, 213 S. W. 242 (Tex. Civ. App. 1919); cf. Umans v. N. Y. Life Ins. Co., 259 Mass. 573, 156 N. E. 721 (1927), in which the court said: "As the answers in the application were false, the policy never was reinstated"; Goodwin v. Provident Sav. Life Assur. Ass'n., 97 Iowa 226, 66 N. W. 157, 32 L. R. A. 473 (1896).

⁶213 S. W. 242, 244 (Tex. Civ. App. 1919), reversing the previous decision reported in 175 S. W. 757 (Tex. Civ. App. 1915).

⁷Mass. Benefit Life Ass'n. v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261 (1898); Wamboldt v. Reserve etc. Ins. Co., 191 N. C. 32, 131 N. E. 395 (1926).

asserted within the contestable period, it is reasonable that the insurer have the relief of an equitable action for cancellation.⁸

In computing the contestable period, those defenses arising out of the policy itself should be carefully distinguished from defenses arising from transactions connected with the reinstatement contract, the contract period in the former beginning from the date of original issue.⁹ The effect of supplemental contracts, commonly called "riders," is frequently injected into controversies over incontestable clauses. Where a rider providing for benefits in addition to those in the original policy has been substituted upon independent consideration for certain other provisions in the policy, and where the substituted rider bears the same date as the original policy and provides that it shall be a component part thereof, the great majority of courts hold that the incontestable clause in the said policy applies from the date of the policy itself, and not from the date on which the substitution is made.¹⁰ This is an apparent exception to the rule as applied in the instant case, but may possibly be considered in harmony therewith by the customarily assigned, but easily criticized reasons, namely: that the rider is expressly made a component part of the policy and is subject to its provisions, and that, therefore, it merely continues with the policy, as if it had been in existence upon the latter's execution.

Another class of cases which forms what might be called an exception to the general reinstatement-clause rule is the group which considers the problem of the policy limiting the liability of the insurer if the insured commits suicide within a certain time. The majority of courts which have ruled on the point seem to hold that the effective period of the suicide exemption clause is reckoned from the date of the original contract, notwithstanding the fact that the policy had lapsed and had been reinstated upon payment of overdue premiums and satisfactory evidence of insurability.¹¹ Again, the courts refuse to frankly

⁸*N. Y. Life Ins. Co. v. Seymour*, 45 F. (2d) 47, 73 A. L. R. 1523 (1930) (where incontestable period was running after reinstatement); *Jefferson Standard Life Ins. Co. v. Keeton*, 292 Fed. 53 (C. C. A. 4th, 1923); *N. Y. Life Ins. Co. v. Sisson*, 19 Fed. (2d) 410 (D. C. 1926); *Mutual Life Ins. Co. v. Wiegmann*, 214 Mo. App. 54, 256 S. W. 505 (1923); see annotation in 73 A. L. R. 1529 on jurisdiction of equity in such cases; note (1926) 21 ILL. L. REV. 406.

⁹*Goodwin v. Provident Savings Life Ass'n.*, 97 Iowa 226, 66 N. W. 157, 32 L. R. A. 473 (1896); *Monahan v. Fidelity Mutual Life Ins. Co.*, 242 Ill. 488, 90 N. E. 213, 134 Am. St. Rep. 337 (1909); *Arrowsmith v. Old Colony Life Ins. Co.*, 164 Ill. App. 44 (1911); *Mutual Life Ins. Co. v. Lovejoy*, 201 Ala. 337, 78 So. 299, L. R. A. 1918 D, 860 (1919) (where contest period expired before policy lapsed).

¹⁰*Wamboldt v. Reserve Loan Life Ins. Co.*, 191 N. C. 32, 131 N. E. 395, 45 A. L. R. 1360 (1926); *Lancaster v. Southern Ins. Co.*, 153 N. C. 286, 69 S. E. 214 (1910); *Am. Nat. Ins. Co. v. Thompson* (Tex. Civ. App.) 186 S. W. 254 (1916).

¹¹*Tatum v. Guardian Life Ins. Co.*, 75 Fed. (2d) 476, 98 A. L. R. 341 (1935) (holding in this manner even though reinstated policy be regarded as a new contract); *Mutual Life Ins. Co. v. Lovejoy*, 201 Ala. 337, 78 So. 299 (1917), reaffirmed in 203 Ala. 452, 83 So. 591 (1919); *Business Men's Assurance Co. v. Scott*, 17 Fed. (2d) 4 (C. C. A. 8th, 1927), (cert. denied in 275 U. S. 531, 48 S. Ct. 28, 72 L. Ed. 410); *Life and Casualty Ins. Co. v. McCray*, 187 Ark. 49, 58 S. W. (2d) 199 (1933).

call this an exception to the general rule laid down in the principal case, and assert that there is merely a restoration of the original contract and a continuance thereof.¹²

The rationale by which the courts have held that the incontestable clause of the original policy begins running anew from the date of reinstatement as to the reinstatement contract is inconsistent and contradictory according to traditional logic.¹³

Nevertheless, it is indisputably the soundest doctrine from the standpoint of fairness and an equitable application of the contract. As pointed out by Justice Cook, in his excellent opinion in the principal case: "Any other view would open the door to the grossest deceit and fraud in securing the reinstatement of a policy that had become incontestable under its original provisions."¹⁴

WILLIAM ETHRIDGE, JR.

MUNICIPAL CORPORATIONS—LIABILITY OF MUNICIPALITIES: FOR TORTS—DISTINGUISHING GOVERNMENTAL AND CORPORATE FUNCTIONS.

A city police officer, while patrolling his beat in an automobile, overtook and ran over a bicyclist. The officer had lost control of the automobile as a result of looking back to see what had happened to a dog struck by his machine. Certain ordinances of the city required that police officers note and report condition of bridges, culverts, sewers, streets, and sidewalks, while patrolling their respective beats. HELD: The courts, in view of the ordinances above mentioned, should not be called upon to attempt the technical task of "unscrambling the mixed relations" in which the city has placed itself. Verdict for plaintiff in lower court affirmed. *City of Meridian et al. v. Beeman*, ... Miss. ..., 166 So. 757 (1936).

The principle that "In the preservation of public peace, the administration of justice, in attending to the public health, . . . the municipality acts as an agent of the state in the exercise of its public, governmental power and is subject to the absolute control of the state, and is not liable for injuries or loss sustained, resulting from its negligence in the performance of such duties, or for its failure to perform them,"¹ has long been recognized and followed in this state.²

¹²See *Tatum v. Guardian Life Ins. Co.*, 75 Fed. (2d) 476, 478 (1935): "The insurer's approval is only an admission of satisfaction with which the insured might dispense if the insurer refused it, when in fact satisfied; he might even compel the reissuance of the policy by specific performance. In that view, of course, the policy, when reinstated, remains what it was before; its terms cannot be read as though it had its inception at the time of the reinstatement; and those cases which allowed the insurer to contest the reinstatement for a fraud occurring after the policy has become incontestable are only instances where the insured has never in fact fulfilled the prescribed conditions."

¹³See criticism thereof in note (1928) 23 ILL. L. REV. 93.

¹⁴Note (1927) 14 VA. L. REV. 136 (concerning *Mutual Life Ins. Co. v. Dreeben*, *supra*, notes 2, 5); for general discussion of the varied effects of incontestable clauses in life insurance policies, see Cooper, *Incontestable Life Insurance* (1924) 19 ILL. L. REV. 226.

¹I POND, PUBLIC UTILITIES (1932) c. 15, § 341.

²*Sutton v. Carroll County*, 41 Miss. 236 (1866); *Alexander v. Vicksburg*, 68 Miss. 564, 10 So. 62 (1891); *City of Pass Christian v. Fernandez*, 100 Miss. 76, 56 So. 329, 39 L. R. A. 649 (1911); *City of Gulfport v. Shepperd*, 116 Miss.

By statute,³ the city is under a duty to preserve good order and peace of the municipality. The court, in the course of its decision states, "The court is not confronted with a case where, at the time, the testimony shows that the police officer was definitely in pursuit of a criminal, or was definitely responding to an emergency call in respect to those duties which are distinctly police in their nature; and this opinion and decision is not to be construed as covering such a case."⁴ The question then arises, is not an officer patrolling his beat in the act of preserving good order and the peace of the municipality? Is not the preservation of peace by patrolling a beat as distinctly police in its nature as the pursuit of a criminal after such peace has been destroyed?

Is this decision to be taken as an indication that, in the future, the court will tend toward limiting the exemption of municipalities in cases of tort liability? For several years, writers⁵ have advocated placing a restriction upon this doctrine. The state of New York has gone so far as to place a limitation upon the exemption of municipalities by statute.⁶ In other instances,⁷ without benefit of statutes, courts have employed various devices to evade this age-old principle. The Supreme Court of Florida in a decision⁸ holding the city liable, said, "In view of the organic rights to acquire, possess, and protect property, and to due process and equal protection of the laws, the principles of nonliability and *damnum absque injuria* are not applicable when in the exercise of municipal authority or the police power, private, personal, and property rights are interfered with, injured, or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare."

A good example of the arguments advanced advocating a change is to be found in the following statement of Doddridge:⁹ "Looked at in the light of abstract justice, there seems to be no good reason why the municipality which has been guilty of an act for which a private concern would be liable, should not be required to compensate the injured party. Certain it is that the plaintiff who has been run down by a truck owned by the fire department may be as badly hurt as he who is run down by a truck owned by the waterworks department. Yet with the distinction operating, the one could not recover while the other could. On principle it would seem well if the distinction were abolished entirely in this class of cases."

439, 77 So. 193 (1917); *City of Hattiesburg v. Geigor*, 118 Miss. 676, 79 So. 846 (1918); *Byrnes v. Jackson*, 140 Miss. 656, 105 So. 861 (1925); *Bradley v. City of Jackson*, 153 Miss. 136, 119 So. 811 (1928).

³MISS. CODE ANN. 1930, § 2406.

⁴166 So. 758 (1936).

⁵Angell, *Sovereign Immunity—The Modern Trend* (1925) 35 YALE L. J. 150; Barry, *The King Can Do No Wrong* (1925) 11 VA. L. REV. 349; Tooke, *The Extension of Municipality Liability in Tort* (1925) 19 VA. LAW REV. 97; Borchard, *Governmental Liability in Tort* (1924-25) 34 YALE L. J. 1, 129, 229 (1928); 28 COL. L. REV. 577, 734.

⁶N. Y. Laws 1929, c. 466, § 282-g.

⁷*Walters v. The City of Carthage*, 36 S. D. 11, 153 N. W. 881 (1915); *Opocensky v. City of Omaha*, 101 Neb. 336, 163 N. W. 325 (1917); *Maxwell v. Miami*, 87 Fla. 107, 100 So. 147 (1924); *Kelly v. City of Niagra Falls*, 131 Misc. 934, 229 N. Y. Supp. 328 (1928).

⁸*Maxwell v. Miami*, 87 Fla. 107, 100 So. 149 (1924).

⁹Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations* (1925) 23 MICH. L. REV. 325 (1925).

Borchard,¹⁰ in an article appearing in the American Bar Association Journal,¹¹ points out the injustice of the present state of the law by this comment: "The modern state has assumed the responsibility of alleviating the misfortunes of the handicapped. It cares for the sick; it seeks to prevent disease; it grants mothers' pensions; and it provides special occupation training for the handicapped citizen. . . . It even supplies entertainment and recreation. . . . Yet such is the conservatism of the law that it will not compensate the citizen who is injured and maimed for life by the negligence of its servants. Not only does the city refuse to compensate the victims of its negligence, but maintains a staff of legal representatives equipped to resist the efforts of its citizens to collect compensation through the courts."

Assuming the injustice of the present rule, should the rule be modified by legislative enactment or by a process of judicial determination? Judge Griffith seems to favor the former method. In his dissenting opinion,¹² he states, . . . "any modification thereof or declaration which would substantially trench upon the practical operation of the rule should be made by legislative enactment rather than by judicial decision." On the other hand a disintegration of municipal immunity by means of the tools available to the common law has the decided advantage of flexibility. If the latter procedure is followed, the court, by a juristic manipulation of the terms, *governmental and corporate* purposes, or by the use of such devices as that employed in the present case, may be equipped to deal more adroitly with the conflicting interests of each concrete situation than if it were confined to the interpretation of an arbitrary statutory enactment.

M. HARPER.

¹⁰Edwin M. Borchard, Hotchkiss Professor of Law, Yale University.

¹¹*State and Municipal Liability in Tort — Proposed Statutory Reform* (1934) 20 A. B. A. J. 747.

¹²166 So. 758 (1936).

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